

THE UNREFORMED SENATE OF CANADA

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•With an Introduction by

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PREFACE

I SUBMIT with many misgivings this little book to the public. In dealing with such a wealth of material as exists in regard to the Senate the selection of relevant facts is a difficult matter, and I realize fully that I have not brought to the problem all the available evidence. Yet I hope that my readers will not impute to me any partiality of intention in my selection or omission of facts. As to my conclusions I am not so sanguine as to expect that they will not meet with opposition. I will, however, have my reward if those who disagree with my position will be thereby stimulated to investigate the subject more thoroughly, because I feel that it is only by knowing the facts that the problem of the Senate can be satisfactorily settled.

If Canadian political institutions are to be valuable instruments of progress for the nation, the intelligent interest of Canadians based upon sound knowledge is necessary. The task of seeking this knowledge is the province of the student, and I take the opportunity here to plead for a greater interest on the part of students in Canada's political institutions. On the historical and biographical sides of Canadian political life much has already been written. The late Professor Lefroy and others have contributed greatly to our knowledge of the legal framework of the

constitution. Todd and Bourinot have supplied admirable treatises on the procedure of Parliament. As yet, however, little investigation has been made into the actual working of political institutions in Canada. This deficiency was one of the chief difficulties encountered in the preparation of this study.

I am deeply grateful for assistance from many sources in the preparation of this work. I wish also to acknowledge the consideration of the officials and members of both Houses of Parliament from whom I have sought information, and particularly of Mr. A. E. Blount, Clerk of the Senate; Mr. Hinds, Chief Clerk of the Senate Committees; the Honourable Hewitt Bostock, Speaker of the Senate; the Honourable Raoul Dandurand, Leader of the Government in the Senate; Sir James Lougheed, Leader of the Opposition in the Senate; Sir George Foster, the Honourable W. B. Ross and the Honourable Gideon Robertson. I am indebted to the following for reading a part or the whole of the manuscript and for pointing out inaccuracies and making various suggestions: Professor Edward S. Corwin and Professor William Starr Myers of Princeton University; the Honourable Thomas Chapais, Professor of History at Laval University; Professor W. P. M. Kennedy of the University of Toronto; Mr. C. H. A. Armstrong, formerly secretary to Sir Robert Borden. Above all, I am indebted to Professor George M. Wrong of the University of Toronto for his care in reading the whole manuscript, for arranging for publication and honouring the book with an introduction; and to my wife, for her sympathetic encouragement and assistance throughout the whole course of preparation. I need scarcely say,

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however, that for conclusions and for any inaccuracies I take full responsibility.

Finally, I wish to record my thanks to the Graduate School of Princeton University for granting me leave of absence for several months, while enjoying one of its fellowships, to gather information for this book.

R. A. M.

Dec. 1925.

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ABBREVIATIONS USED IN THE NOTES

- C.D.* Debates of the House of Commons of Canada.
C.ŷ. Journals of the House of Commons of Canada.
S.D. Debates of the Senate of Canada.
S.ŷ. Journals of the Senate of Canada.
Conf. Deb. Parliamentary Debates on the Subject of Confederation of the British North American Provinces.

INTRODUCTION

BY GEORGE M. WRONG

THE problem of the Second Chamber is ever with us. No other type of legislative body arouses so much discussion as to its value. The popular chamber has always the same characteristic ; the members are elected by the people, the difference consisting in the nature of the franchise, whether more or less restricted. The second chamber, on the other hand, shows great variety of type. In the United States and in Australia members are chosen on a liberal franchise ; in France by indirect election ; in Canada they are appointed for life by the government of the day ; in Great Britain they sit chiefly by hereditary right. In unitary countries like Great Britain, France and Italy, problems of reform are simpler than they are in the federal system of the United States and Canada. The variation of type involves equal variation in proposals for reform.

Great Britain, with a single sovereign authority, is not perplexed in respect of the problem of a second chamber by any question of the right of Parliament to alter the character of the chamber. In recent years Great Britain has limited the powers of the second chamber by Act of Parliament, dictated by the will of the people, and no section of the United Kingdom can say with truth that a fundamental right has been violated. Under a federal system, however, agreements and compromises in respect of division of powers may

exist which amount to contracts between the central and the local authority. When Germany became a federal empire, not by the vote of its people but by decree of its leaders, victorious in war, individual states showed a jealous regard for their peculiar rights. Bavaria retained its own postal system and the right of direct relations with foreign powers, and occupied a special position in the Bundesrath, which was both a governing body and a second chamber. To modify her rights, without her consent, would have been an act of revolution. In the United States the individual states were, according to a theory widely held, especially in the South, sovereign commonwealths which, by agreement with each other, had set up a federal union with limited powers. At the cost of a devastating civil war the federal power made good its claim that this political marriage was indissoluble, but the individual state retained its sovereign authority within its own field, and no one proposed to mend or to end the Senate, the second chamber in which was preserved the equality of the states in the union. So convinced of the value of the second chamber are the people of the United States that every one of the state legislatures has two chambers, both of them elective. Suggestions for abandoning the principle of two chambers do not come within the range of practical politics in any of the states.

During the last hundred years there has never been a time when reformers have not attacked the second chambers in what is now Canada as useless or arbitrary and, in either case, requiring change or extinction. In 1867 Canada became a federal state which soon stretched from the Atlantic to the Pacific. A complete union in one Parliament of the French and the English elements was replaced by the lighter federal bond, which left the French in a majority in what became the Province of Quebec and the English in a majority in the Province of Ontario. Each province was left in control of education, municipal government, and other

affairs, chiefly of sectional interest. The federal union was based upon an agreement embodied in the terms of an Act of the British Parliament which could not be changed by the parties to the agreement. Apart from its inevitable outline of a federal system the most striking feature of the agreement is its guarantees to minorities. French, the language of the minority, was placed upon an equal footing with English in federal affairs. Religious minorities, the term meaning chiefly the adherents of the Roman Catholic church, were guaranteed the continuance of all the rights which they had enjoyed prior to the federal union. The implied principle was that, with the agreement once created, changes could not be made without the consent of both the majority and the minority concerned.

The federation of Canada involved an interesting feature—the abolition of the second chamber in some of the legislatures of the provinces. Québec retained a second chamber; Ontario preferred a single chamber; and a similar contrast is found between Nova Scotia and New Brunswick. From Quebec westward, however, the legislatures of all the provinces have only a single chamber. Thus the people of Canada have before their eyes the two types of legislature. It is perhaps significant that the two sections with the longest history, Quebec and Nova Scotia, have alone retained the second chamber.

Plans to mend or end the Senate of Canada are confronted by the problem of securing the consent of the minority. The people of the province of Quebec are suspicious of constitutional changes which may imperil their own cherished social and political ideals. Sometimes they underestimate the truth that the final security for their rights lies less in legal guarantees than in the validity of their political power in the Canadian Union. No government could long endure in Canada which was open to the charge of violating the fundamental agreement on which the Union is based. Be this as it may, a thorough and impartial

examination of the whole problem of the second chamber in Canada has long been needed, and this we now have in the present volume. Its author left the study of the ancient Classics in the University of Toronto to take part in the Great War. After the war he turned to history and, in 1920, graduated at the University of Toronto with first-class honours in Modern History. Since then his studies as a graduate student were continued at Princeton University, and he is now Assistant Professor of Government in Cornell University. His volume combines thoroughness of research with an attractive literary style and will be welcomed as a scientific treatment of a living political problem.

I

THE PROBLEM

THE problem of a second chamber recurs annually in Canada. Scarcely a year passes but the Senate emasculates or rejects some piece of legislation in which a section of the public is interested. If a bill for social or moral reform is rejected the Senate is attacked from end to end of the country by impatient reformers and condemned as an immoral, reactionary, and autocratic body. If a government measure fails when the opposite party happens to be in the majority in the Senate the faithful party press hurls a torrent of abuse upon it as a partisan house. Of late years it has become the fashion to attack the Senate as the foe of public ownership because it has interfered with several bills for the construction of railways by the Dominion. The Senate as a "Home for the Aged," as a refuge for old warriors, and as a means of rewarding contributors to the party war chest, is the continual butt of newspaper wits. And yet, for all its unpopularity, the Senate continues on its dignified way, little changed from what it was a half century ago.

The reform of the Senate has been in the air almost since the federation of 1867. In 1875 the subject was introduced and debated at length for the first time in Parliament. Since then the debate has been reopened many times in both Houses with renewed interest, if with little fresh information and few new ideas. Governments and parties have on different occasions

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pledged themselves to reform, but so far without result. During the last three decades of the past century political journalism was enlivened by the demand for abolition from the pen of Goldwin Smith. In recent years this solution has been sponsored by the United Farmers and other groups. The problem was brought to the fore once more by the proposal in the Speech from the Throne in 1925 to call a conference of the provincial governments to discuss reform. Thus to mend or end the Senate has become again a matter of practical politics.

In recent years the problem of second chambers has also been under discussion in other countries. In the United States the power of the Senate, its control of the Executive, particularly in foreign affairs, its overshadowing of the House of Representatives as a popular legislature, and its partisan hunts for scandals, have raised the question whether a strong second chamber is desirable. In England the Parliament Act of 1911, which limits the veto powers of the House of Lords, and the various discussions on its reform during the past fifteen years have weakened the faith in that institution of even its most ardent admirers. On the other hand, only three of all the countries in the new Europe have omitted a second chamber; and these, Finland, Esthonia and Jugoslavia, have not yet tested their constitutions sufficiently in the fires of practical politics to disprove the usefulness of second chambers.¹ That the second chambers of the new Europe are not merely servile imitations of other second chambers already in existence is attested by the fact that scarcely any two are alike. That the second chamber idea will not down suggests that there is something of value in it.

Yet the experience of other countries is not conclusive evidence that a second chamber is of value to Canada. Political institutions differ from state to state. Institutions which are suited to one state are not

¹ Greece also has a single chamber.

necessarily suited to another; even were the whole world on the same plane of civilization and political education it would be hazardous to say that there was but one pattern to which all political institutions must be cut. While *a priori* reasoning has been of value in determining the ends of government, the means have been shaped for the most part by compromise among the complex forces of the national or racial character of a people, their political experience, and the geography of the state. The forms of government in any state must, therefore, be decided primarily by a consideration of the facts of its political life. The experiences of other states may be of value as throwing additional light upon those problems, or as suggesting solutions, but the reasons upon which conclusions are ultimately based must be deduced from a country's own experience rather than from that of another. And so it is with Canada's second chamber.

I shall approach the question, then, from this angle. In order to make clear the reason for the existence of the Senate I shall discuss briefly its origins (Chapters II and III). I shall then attempt to define the limits of the field of activity to which an upper chamber is necessarily confined by the nature of cabinet government as it has developed in Canada (Chapter IV). The next step will be to analyse the work which the Senate has actually done, and to estimate its value (Chapters V to IX). Following this I shall discuss its activity in the light of some general conclusions as to the proper functions of an upper chamber when the lower controls Ministries (Chapter X). Finally, I shall consider some proposals for reform (Chapter XI).

II

COLONIAL ANTECEDENTS

THE granting of responsible government to Canada after 1840 marked the culmination of over two centuries of experiment in colonial government. They were centuries of compromise between the principles of local self-government and imperial control. Both of these principles found expression in colonial institutions—self-government in an elected lower house, imperial control in an irresponsible executive and a non-elective council which was at once a privy council to the governor and an upper house of the legislature. There was, moreover, a third influence at work in fashioning colonial institutions, and this, the conscious effort of colonists and Englishmen at home to mould colonial institutions on the pattern of those of the parent state. Upper houses in North America, therefore, may be traced back to two sources—the influence of British institutions and the necessity for imperial control.

The Governor's Council in the American Colonies.

In 1607, when a little band of hardy adventurers landed in Virginia, on the fever-stricken banks of the James, English institutions were first planted in the New World.¹ The immediate government of the colony was entrusted to a local council selected by and responsible solely to the London Company, which had sponsored the venture. The members of this council

¹ Wertenbaker, *Virginia under the Stuarts*, 1 ff.

were empowered to elect one of their members as president; otherwise they were all equal. In the face of the disasters which threatened the colony, however, this council was impotent, and within three years it was replaced by a governor appointed directly from London. Under instructions from the Company the governor chose a small council to advise and assist him. This council was responsible to him, while he, in turn, was responsible to the Company. Together, governor and council performed the whole work of government; they passed ordinances to meet the local needs of the colony, they themselves enforced these, and, on occasion, interpreted them as a court.¹ The success of this form of government in piloting the colony through the first terrible years of its infancy gave it prestige, and the governor and nominated council became the typical form of government for the early years of royal and proprietary colonies.

But the governor and council were not long to enjoy alone the reins of government in Virginia. Owing largely to liberal influences among the shareholders of the London Company, within a dozen years of the founding of the colony the seed of representative government was planted in the New World. In 1619 the proclamation of Governor Yeardly, but lately arrived from England, declared:

'That they might have a hand in the governing of themselves, it was granted that a General Assembly should be held yearly once, whereat were to be present the Governor and Counsell, with two Burgesses from each plantation freely to be elected by the inhabitants thereof; this Assembly to have power to make and ordaine whatsoever lawes and orders should by them be thought good and proffittable for our subsistence.'²

On August 19, 1619, a day no less worthy to be remembered than the date of the meeting of Simon de Montfort's or the first Edward's Parliament in

¹ Wertenbaker, *Virginia under the Stuarts*, 17.

² *Ibid.* 36.

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England, the first representative assembly in the New World met at Jamestown.

“The most convenient place we could finde to sitt in,” says the minutes, “was the Quire of the Church Where Sir George Yeardley, the Governor, being sett down in his accustomed place, those of the Counsel of Estate sate nexte him on both hands excepte onely the Secretary then appointed Speaker, who sate right before him, John Twine, the clerk of the General Assembly, being placed nexte the Speaker, and Thomas Pierse, the Sergeant, standing at the barre, to be ready for any service the Assembly shoulde command him. But forasmuche as men’s affaires doe little prosper where God’s service is neglected, all the Burgesses tooke their places in the Quire till a prayer was said by Mr. Bucke, the Minister. . . . Prayer being ended, . . . all the Burgesses were intreated to retyre themselves into the body of the Church, which being done, before they were fully admitted, they were called in order and by name, and so every man tooke the oathe of Supremacy and entered the Assembly.”¹

From the governor’s proclamation and the records of the first meeting it seems to have been the intention of the Company and the understanding of the settlers that the elected representatives of the people should simply meet with the governor and council to participate in the work of legislation. At any rate, for the first few years, governor, council, and elected representatives all met together once a year as a single legislative chamber. At other times the governor and council met together and deliberated on executive or administrative business.

English traditions were, however, against a single legislative chamber composed alike of the representative of the Crown with appointed advisers and the elected representatives of the people. Moreover, it is not improbable that the governor sometimes found inconvenient the close contact with elected members, which a single chamber entailed. Inevitably it led to an undue prying into executive business and the interests of the

¹ Wertenbaker, *Virginia under the Stuarts*, 37.

Crown. But, whatever the immediate causes, within a few years the elected members withdrew in a body to meet as a people's assembly.¹ From its earliest days as a separate house the assembly laid claim to the sole right of granting taxes, of electing its own Speaker, and of judging the elections of its own members, while it consistently refused the governor and council the right to independent legislation. In short, the assembly looked upon itself as a colonial house of commons, and as such was quite as jealous of its rights and privileges as its great contemporary. Meantime the council continued. It sat as an upper house of the legislature when the assembly was in session, maintaining its right to reconsider all legislation, even tax bills, sent up from the assembly. Though at first a joint committee of both houses undertook the judicial duties hitherto performed by the council and governor, by the end of the seventeenth century the council had usurped the whole work. In addition to its legislative and judicial duties the council was a sort of privy council to the governor. Its members held their seats at pleasure and usually enjoyed, as well, official positions in the colonial executive or judiciary, from which they might be suspended by the governor, or removed by the Crown on his recommendation.²

The development of the institutions of government in Virginia cast the mould for the type of government in all the royal colonies on the mainland of the continent. It was destined to endure, with a few important variations, until the revolt of the colonies a century and a

¹ In the division of colonial legislatures into two houses there is a remarkably close parallel to the separation of the Lords and Commons in England which occurred between the reigns of Edward I. and Edward III. Pollard in a vivid description shows that the Commons withdrew to deliberate by themselves, apparently because they felt overawed and diffident in the presence of the King and his council. See Pollard, *Evolution of Parliament*, 120 ff. Fiske relates that in Massachusetts the immediate cause of the division into two houses was a dispute between a wealthy captain and a poor widow over a stray pig. In the suit the captain won the support of a majority of the assistants while the widow was supported by the elected deputies. John Fiske, *New England*, chap. iii.

² Wertenbaker, *Virginia under the Stuarts*, 38-42.

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half later. With the spread of royal power at the close of the seventeenth and in the early part of the eighteenth century this type of institution was extended to New Hampshire, New York, New Jersey, the Carolinas, and Maryland. Before the Revolution, with the single exception of Massachusetts, where the council was elected by the assembly, the type of government developed in Virginia was all but universal wherever the Crown held direct control over the colonies.¹

While Englishmen and colonists professed to see in colonial institutions the transcript of those of England, the resemblance was more apparent than real. In a general way the assembly resembled the House of Commons, but the council was unlike the House of Lords. Strictly speaking, the council was not an upper house of the legislature, though it performed the functions of one. It was rather a seventeenth century edition of the old King's Council, whose duties were to assist the governor, as the older council did the King, in the whole work of government. Colonial governments, indeed, were much like the seventeenth century institutions of England with the House of Lords omitted. In short, the governor's council more nearly resembled a cabinet or privy council than it did the House of Lords. Yet both Englishmen and colonists persisted in considering the council an upper house.² The reason for this was undoubtedly the influence of English institutions. In the seventeenth and eighteenth centuries there were no other representative political

¹ 'The Upper House usually consisted of from six to twenty men, summoned by the colonial governor, to serve for an indefinite period as advisers to the executive, just as many years ago was summoned the first body of nobles in England as advisers to the king.' Thorpe, *Story of the Constitution*, 16. Cf. also Morris, *History of Colonization*; Reed, *Form and Functions of American Government*; Moran, *Bicameral System in America*, 'J.H.U. Studies,' vol. xiii.

² 'The Commissions and Instructions contemplated a government by a governor and a two-chamber legislature, one chamber of which was to be elected by the people and the other appointed by the Crown. The Upper House acted as an Executive and Advisory Council for the governor, and was also supposed to have as much voice in legislation as the Lower House.' Dickerson, *American Colonial Government, 1696-1765*, 158.

institutions worthy of the name, hence for colonists and English politicians alike there was only one model. Though colonial institutions differed essentially from those of England, it pleased men to think them as nearly alike as possible, and to endeavour to make them so.

The influence of the English model is perhaps seen best in the remarkable development which occurred in the incorporated governments of Rhode Island and Connecticut, and in the proprietary government of Pennsylvania. Both Rhode Island and Connecticut began with a single chamber which elected both governor and council.¹ For the first few years all sat together as a legislature, but the immediate representatives of the people, becoming jealous of their powers and fearful of official influence, withdrew and sat by themselves as a lower house, laying claim to the privileges and rights usually incident thereto. The council, for its part, thereupon took upon itself the duties of an upper house, as well as those of a privy council to the governor.² In Pennsylvania the governor, an appointed official, was provided originally with a small council elected by the assembly for his advice and assistance. The council was intended to have no power whatever to initiate, amend, or reject any legislation from the assembly.³ Eventually, however, through suggesting to the governor changes in bills, or advising either the exercise of his veto until the assembly should make the changes demanded, or the unqualified rejection of bills, it began to exercise considerable legislative duties of an upper house.⁴

Neither the weight of tradition nor the general use of the council throughout the royal colonies could, however, make it an efficient or popular institution.

¹ Moran, *Bicameral System in America*, 16-26.

² *Ibid.* 22, 26.

³ According to the Charter of 1701. Previously the governor and the council had the sole right of preparing bills which the assembly could reject or amend. *Ibid.* 40-41.

⁴ *Ibid.* 41.

Though on occasion it would throw in its lot with the cause of the assembly in its ever-recurring fight with the governor, when it opposed the assembly it was open to the charge of official influence, because its members held office at the pleasure of the Crown.¹ Not infrequently it became the house of an official clique interested in the emoluments of office rather than in the good of the colony or in the interests of the Empire. From the imperial point of view the presence of a nominated council was a *sine qua non* of a representative assembly, but history shows that it was an untrustworthy check.²

The theory of a second chamber existed throughout the whole colonial period of American history, but it was never completely realized. The reasons for this failure are obvious. During the seventeenth century the English Parliament itself was still in a state of transition, and there was no clear distinction, even in the minds of English politicians, between the legislative functions of an upper house and the executive functions of the King's Privy Council. The distinction of functions was indeed becoming clearer, but it was still clouded by the fact that the King's Ministers were usually members of the House of Lords as well.

There was, moreover, no foundation for a colonial aristocracy. Even as late as the Revolution no colony, with the possible exception of Virginia, possessed the nucleus of an upper class bound together by common economic and social interests. In addition, throughout the whole colonial period, men of substance or of

¹ The assembly of Maryland on one occasion made the following complaint: 'Suppose the Peers in Great Britain held their seats there at the pleasure of the Prince and that he could place and displace them as he thought fit; suppose them also possessed of all the great offices of the Government upon the same precarious terms; could that be called a free and independent branch of the Legislature, which should keep a balance between the Prince on the one side and the people on the other, or could it with any colour of reason be said that a house so composed or so endowed enjoyed all freedom of action and was at all times clear from any restraint?' Osgood, *The American Colonies in the Eighteenth Century*, vol. iii. 19.

² See Grenville, *post*, p. 11.

education were comparatively few in numbers in every colony. As for creating an upper house by popular election, the proposal was too absurdly democratic for even the colonists, while no English statesman would for a moment have contemplated the suggestion. The American Revolution, if it had no other immediate result on the political thought of Englishmen, confirmed in their minds the doubts that they already entertained as to the usefulness of the governor's council.

After the Revolution British politicians were convinced, for the most part, that the colonies had been lost through slackness of imperial control, and that the weak link in the chains of Empire had been the local administration in the colony. The governor, as the centre of local control, had been rendered impotent, because there was no adequate local support for imperial interests and policies. The failure lay in the council, the very body designed to uphold his hands. Said Lord Grenville :

‘ It may perhaps be said, with truth, on a view of the old Colonial Governments, that the constitution of the second branch of the Legislature was, of all others, the point in which they were the most defective. . . . To the want of an intermediate Power, to operate as a check, both on the misconduct of Governors, and on the democratical Spirit, which prevailed in the Assemblies, the defection of the American Provinces, may perhaps be more justly ascribed than to any other general cause which can be assigned.’¹

The primary cause of the weakness of colonial administration was, in Grenville's opinion, that there was no proper ‘ aristocratical part ’ in the colonial constitutions.² This sentiment, indeed, was shared by all the more prominent statesmen of the period. Pitt declared that the want of a proper aristocracy ‘ had tended to accelerate the separation of the former colonies.’³ Fox asserted that ‘ it was a principle never to be

¹ Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1759-1791, 978.

² *Ibid.*

³ *Parl. Hist.* xxix. 416.

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departed from that every part of the British dominions ought to possess a government in the constitution of which monarchy, aristocracy and democracy were mutually blended and united'; aristocracy gave 'the proper poise of the constitution, the balance that equalized and meliorated the powers of the two other extreme branches, and gave stability and firmness to the whole.'¹ Faced in 1791 with the problem of granting representative institutions to the new province of Canada, Parliament was, therefore, generally convinced that the principle of aristocracy must be firmly implanted in the colony's constitution.

The Experiment in Canada.

In Canada the demand for a representative assembly gathered force after the immigration of the Loyalists following the Revolution, and British statesmen began to look about for a means of supplanting the old council. An assembly had already been granted to each of the Maritime Provinces, to Nova Scotia in 1749,² to Prince Edward Island in 1773,³ and to New Brunswick in 1784.⁴ In each the time-honoured council, with its threefold duties of an upper house, a privy council, and a superior court of the colony, was set up. In Canada, however, a new institution to remedy the defects of the old colonial governments was created by the Constitutional Act of 1791.⁵ The Act contemplated the division of the colony into two provinces, Upper and Lower Canada, and provided for similar institutions of government in each. In addition to a representative assembly elected on a wide franchise it provided for a legislative council, the first real upper house in British

¹ *Parl. Hist.* xxix. 409.

² Bourinot, 'The Legislative Council of Nova Scotia,' *Transactions Royal Society of Canada*, 1896.

³ Warburton, *History of Prince Edward Island*, 175.

⁴ Kennedy, *Constitution of Canada*, 80.

⁵ For text see Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, 1031 ff., or Kennedy, *Documents of the Canadian Constitution*, 207 ff.

colonial history. Influenced by previous experience in governing a colonial empire, and the prevalent Whig doctrines of aristocracy as the balance wheel of government, the framers of the Act attempted to mould the new institution as closely as possible upon the model of the House of Lords.

Members of the new upper house were to be appointed by the Crown, and were to hold their seats for life. In order to maintain the necessary control of the Crown, membership was to be unlimited as to numbers. Moreover, the Speaker, like the Lord Chancellor in England, was to be appointed by the Crown. Finally, there was a provision which smacked most of all of the Old World: a hereditary titled class, who should hold seats in the upper chamber by right of title or heredity, was contemplated. Fortunately for Canada this last provision, though included in the final draft of the bill itself, was never acted upon. 'The Object of these regulations,' wrote Grenville to Dorchester, in discussing the proposals for granting titles, 'is both to give the Upper Branch of the Legislature a greater degree of weight and consequence than was possessed in the old Colonial Governments, and to establish in the Provinces a Body of Men having their motive of attachment to the existing form of Government, which arises from the possession of personal or hereditary distinction.'¹

To such an object there was no opposition in Parliament, but to the means adopted the Whig remnant was stoutly opposed. Fox thought the proposed upper house a slavish imitation of the House of Lords, in that it held out to colonists 'something like the shadow of the British Constitution, but denied the substance.' Since it would be unlimited as to numbers it would be subservient to the Crown, while a titled aristocracy in the New World was an absurdity. Were those 'red and blue ribbons, which had lost so much of their lustre in the Old World to shine forth in the New'?

¹ Grenville to Dorchester, Kennedy, *Documents*, 199.

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he asked. The true foundations of an aristocracy were property and hereditary rank, but there was only one rational basis for a colonial aristocracy and that, property. Let the upper house be elected on a property foundation, electors and elected alike being the larger property-holders of the colony.¹ To this suggestion Burke made the cryptic answer that, 'An elected council would clearly be a democratical council,'² while Pitt declared that such a course would 'render the poise nearer the people than it was to the Crown in the British constitution.'³

The new upper house did not, however, replace the governor's council, except in the matter of legislation. The old council was still continued under the title of executive council. Like its predecessor its members were to be nominated by the governor and appointed by the Crown, but were to hold office only during pleasure. It was to assist in the work of administration. It was not intended that the membership of the two councils should be different, or even that members of the executive council might not be drawn from the assembly.⁴ The executive council, in fact, was meant to be something of a privy council or cabinet, and, though this was not foreseen by the framers of the Act, there was nothing to prevent its being developed into a responsible cabinet in a parliamentary system of government. Indeed, as actually happened, the executive council was the forerunner of cabinet government in Canada.

The new legislatures opened in both provinces with

¹ *Parl. Hist.* xxix. 105-11, 409-11, 426.

² *Ibid.* 420.

³ *Ibid.* 416.

⁴ 'It is by no means intended that the Legislative Council should be excluded from that body (i.e. the Executive Council) or that it should on the other hand be wholly composed of Persons of that description.' Grenville to Dorchester, Kennedy, *Documents*, 199.

The Act did not specially provide for the creation of the executive council, but from references to it in the Act and from the instructions sent to the governor it is evident that the framers intended that its members should be appointed and hold office on pleasure. See Grenville to Dorchester, *ibid.*; Lucas, *History of Canada*, 1765-1812, 252-3.

what old-world pomp and ceremony could possibly be pressed into service. Upper Canada's first 'Parliament' met in a rude log cabin which boasted of but a single door and two windows. Though there were only eight members of the assembly in attendance the governor opened the proceedings with an elaborate Speech from the Throne. In both provinces the proceedings in use at Westminster were adopted in their entirety, and the various officials bore the ancient titles of office and the historic dress in use in Great Britain. As Lieutenant-Governor Simcoe informed the Upper Canadians¹ they now had a constitution which was 'the very image and transcript of that of Great Britain.'¹ But if the forms were there the spirit was lacking, as the next half century of dreary political history was to show. This history it will be unnecessary to consider in detail. It will be sufficient for our purposes merely to discuss the place of the new institution, the legislative council, in the provincial constitutions.

The Legislative Council in Lower Canada.

The political history of Lower Canada under the Constitutional Act is that of a struggle for racial supremacy.² The newcomers to the province were a vocal minority whose avowed intention was to anglicise the native Canadians of French origin whom they regarded as an ignorant peasantry delivered into their hands by the fortunes of war. The Canadians, on the other hand, looked upon the English-speaking minority, and particularly on the New Englanders, as interlopers and heretics. Differences of race, of religion, of social customs, and of language, all united to create the distrust and antagonism which were inevitably expressed in the political life of the colony. The institutions of government set up by the Constitutional Act simply provided a convenient battleground for the racial strife.

¹ Porritt, *Evolution of the Dominion of Canada*, 76-9.

² Kennedy, *Constitution*, 89 ff.

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From the first the Canadians controlled a majority in the assembly, and though unaccustomed to representative institutions they quickly realized that the assembly was a useful weapon in the struggle. The result, as Professor Kennedy observes, was that 'the popular assembly in Lower Canada never in reality took on a political or constitutional aspect. It was an arena for French-Canadianism, an organized expression of race consciousness, a guardian of the people within the gates of an alien system.'¹ English-speaking residents were, therefore, impelled to pin their hopes upon the council. As early as 1808 a prominent official declared 'there is reason to apprehend that... the Assembly of Lower Canada will become the centre of sedition, and the receptacle of the most dangerous demagogues in the Province.' He suggested that the legislative council be increased by eight or ten members, English or 'well-disposed' French, to counteract the dangerous tendencies of the assembly.² During the early years, too, Great Britain was almost continuously at war with France, and there was considerable friction with the United States, which eventually resulted in war. The loyalty of the French Canadians had not been proved too well during the American Revolution and was still open to suspicion. In order to control the assembly, therefore, governor after governor proceeded to 'pack' the legislative council with tried supporters of the executive government.³

Moreover, in practice, the distinction set up by the Act of 1791 between the legislative and executive councils broke down. Legally there were always two bodies, but politically they tended to become one and the same. In the early days some of the executive council usually were members of the elected assembly, but as soon as friction developed it became more

¹ Kennedy, *Constitution*, 157.

² Ryland's 'Observations on the Political State of Lower Canada'; Kennedy, *Documents*, 248 ff.

³ McArthur in *Canada and Its Provinces*, vol. iv, 465.

difficult for a member of the executive council to win a seat in the lower house, and increasingly uncomfortable for him to defend there the executive policy.¹ Henceforth the governor was driven to pick his advisers from the upper house, or from the class in the community which they represented. Eventually most of the executive councillors held seats in the legislative council. In addition to these, other office-holders were also members of the legislative council.² Thus the legislative council became not only the house of the would-be dominant race but also the house of an office-holding clique.

After 1830 the council became the storm-centre of the constitution. Baffled in the attempt to control the governor and the executive by refusing and 'trimming' supplies, the assembly vented its rage on the legislative council and demanded that it be made elective.³ The English-speaking population, on the other hand, rallied to the support of the existing system in the belief that it was the guardian of their rights. The council itself declared that the system of appointment was essential to sustain the prerogative of the Crown, to maintain the British connection, and to give security to the racial minority. An elective council would be a step towards republican institutions and independence, 'while its ultimate result would be to bring into collision the people of Upper and Lower Canada and drench the country in blood.'⁴ Even the moderate reformers declared that the present system

¹ McArthur, in *Canada and Its Provinces*, vol. iv. 454.

² Prof. McArthur estimates that two-thirds of the executive council were also members of the legislative council. Cf. also Lucas, *Lord Durham's Report*, ii. 82.

³ 'The Ninety-Two Resolutions,' Kennedy, *Documents*, 366 ff.

The importance attached by the assembly to the proposed reform is indicated by the fact that out of the ninety-two, thirty-five resolutions dealt with the council while ten more were eulogies of free institutions, particularly those of the U.S. Apparently these latter were meant as a contrast to the council.

⁴ *Ibid.* 362.

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was 'indispensably necessary for the stability of government as now constituted, and for the security of His Majesty's subjects within the Province.'¹ Naturally, the British Government was averse to the change, and the request was flatly refused.²

The storm raised over the legislative council in Lower Canada seems, at first sight, inexplicable. The fault with the constitution was not so much in the appointed and irresponsible council as in the irresponsible executive which took shelter behind the council. But the struggle in Lower Canada was not primarily constitutional; it was racial. In this struggle the council was the visible sign of the dominance of the English. The executive was virtually independent financially; though it was handicapped by the stoppage of supplies it was not crippled; through the council it did not hesitate to reject supply bills which were inadequate, and as such bills provided for necessary public services throughout the province, as well as for the salaries of officials, the assembly's parsimony was turned against itself. The explanation of the attention paid to the council by both parties is that it was the political instrument both of the executive and of the racial minority.³ Said Lord Durham:

'The collision with the Executive government necessarily brought on one with the Legislative Council. The composition of that body . . . must certainly be admitted to have been such as would give it no weight with the people, or with the representative body on which it was meant to be a check. The majority was always composed of members of that party which conducted the executive government; the clerks of each council were members of the other; and, in fact, the Legislative Council was practically hardly anything but a veto in the hands of public functionaries on

¹ 'The Ninety-Two Resolutions,' Kennedy, *Documents*, 388.

² 'In the existing state of Lower Canada it is inadvisable.' Lord John Russell, *ibid.* 435.

³ 'Inconsistent with monarchical government.' The Governor, *ibid.* 365.

⁴ 'An impotent screen between the Governor and the people.' 'Ninety-Two Resolutions,' Kennedy, *Documents*.

all the acts of the legislature in which they were always in a minority.'¹

The Legislative Council in Upper Canada.

In Lower Canada the legislative council was the bulwark of a racial minority; in Upper Canada it was the refuge of a privileged class.² In the early days in Upper Canada practically the only persons whom the governor could select for the executive or the legislative councils were members of a few of the wealthier families of Loyalists. The Tory sympathies of this class naturally drew them to the support of the governor, and the alliance was mutually convenient, the governor gaining support for his policies, and the supporters obtaining control of all important offices. Moreover, the Act of 1791 had set apart lands in value equal to one-seventh of the surveyed lands in the new province for the 'support and maintenance of a Protestant clergy,'³ a phrase which, in spite of its indefiniteness, was consistently interpreted by the various governors and their adherents as meaning the clergy of the Church of England. Thus the adherents of this Church, who soon represented only a minority in the province, were also drawn to support the governor because of the property interests at stake. During the years when trouble was brewing between Great Britain and the United States the governor turned naturally to both classes; their loyalty was impeccable, while that of the newcomers, many of whom had been American citizens, was doubtful. Thus arose the privileged official class later known as the 'Family Compact.' At the close of the war with the United States the 'Compact' held a virtual monopoly of the executive council, the legislative council, the judiciary,

¹ Lucas, *Lord Durham's Report*, ii. 82.

² For an account of the Family Compact and their control of the two councils see Kennedy, *Constitution*, chap. x.; Wallace, *The Family Compact*; Lindsey, *Life and Times of William Lyon Mackenzie*.

³ Sec. xxxvi.

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and all the more important governmental offices in the province.¹

As a result the political position of the legislative council in Upper Canada differed little from that in Lower Canada. In the first place, it represented a minority only, not racial, it is true, but a privileged class united in clinging to office, by their interests, by their sectarianism, and by their Toryism. Secondly, the legislative council became the legislative arm of the executive class, as it was in Lower Canada. 'Usually all the executive councillors held seats also in the legislative council,'² and in that body were aided and abetted by other officials who held office at the pleasure of the executive. Sir John Colborne reported in 1828 that the legislative council was composed of seventeen members, two of whom never attended; of the rest, six were members of the executive council, and four held offices under the government. 'Composed as the legislative council is at present,' said Colborne, 'the province has a right to complain of the great influence of the executive council in it.'³ Thirdly, the council was impregnable against the assaults of the reform party in the lower house and against the storms of wider public opinion.⁴

But the council in Upper Canada never attained such notoriety as did the council in Lower Canada.⁵ In part this was due to the fact that the struggle in Upper Canada was political and constitutional, and the reformers, with true British instinct, assaulted the executive rather than the upper house. The desire was not so much for a popular upper house as for an executive which should reflect the opinions of the majority of the assembly, although the assembly was not unanimous as to the methods whereby this

¹ Kennedy, *Constitution*, 129.

² *Ibid.* 129 and 164.

³ Lindsey, *Mackenzie*, i. 336.

⁴ See attack upon the council, giving list of bills rejected, *ibid.* i. 236.

⁵ The radicals demanded that it be made elective but apparently found little support, *ibid.* i. 334.

could be obtained.¹ Moreover, there was not the constant antagonism between the assembly and the council in Upper Canada that there was in the lower province. There was always a strong government party in the assembly, and on occasion the Government was able to win an election or to carry the assembly with it.² Nevertheless, the council was a source of friction in the machinery of government, and undoubtedly caused much resentment.³

The legislative councils in both provinces were created with the intention that they should safeguard the British connection and protect the prerogative of the Crown. Their zeal for these ends tended to defeat the very purposes for which they were created. Though modelled on the House of Lords they had nothing in common with that institution except that they were a 'non-elective check on the elective branch of the Legislature.'⁴ In both provinces they were utterly out of sympathy with the popular movements of the day and were a contributing cause to the rebellion.

The Councils in the Maritime Provinces.

Meanwhile the earlier type of council was still in existence in the three provinces by the sea. Here the whole government centred in the council.⁵ While the legislature was in session the council sat as an upper legislative house ; as an executive it administered the affairs of the provinces and applied the laws which it had passed as a part of the legislature ; on occasion

¹ Kennedy, *Constitution*, 161 ff.

² E.g. election of 1830. Cf. Kennedy, *Constitution*, 152 ; Lindsey, *op. cit.* i. 187 ff.

³ See account of attempt of council to gain control of finance, Kennedy, *Documents*, 302. Cf. also libel prosecution of Mackenzie for his attack upon the council, Lindsey, *op. cit.* i. 234 ff.

⁴ Durham's comment, Lucas, *Lord Durham's Report*, ii. 325. For more criticism see McArthur in *Canada and Its Provinces*, 467-8.

⁵ Hannay, *History of New Brunswick*, ii. 19-20 ; Warburton, *History of Prince Edward Island*, 176 ; Bourinot, 'Legislative Council of Nova Scotia,' *Transactions Royal Society of Canada*, 1896, 141 ff.

it interpreted these laws as a court.¹ Executive control was more real, more centralized, than it was in Upper and Lower Canada. There was no sham upper house to give the legislature even the appearance of independence. The evils in evidence in Canada here also appeared. In practice, though seats on the council were supposed to be held only 'during pleasure,' membership was virtually for life, and the public opinion of the electorate as expressed at the polls had no effect upon the composition of the council.² Membership of the councils in every province tended to be confined to a small group closely connected by family, business, and religious ties.³ This provincial oligarchy dispensed the patronage only to their friends. The autocratic methods of the councils were even more pronounced than they were in the Canadian provinces. In New Brunswick the council sat for over fifty years behind closed doors, even when acting as an upper house, and published no records of its proceedings.⁴ All three councils were the guardians of privilege, and did not scruple to block any progressive legislation which seemed to endanger the interests of which they felt themselves the representatives.⁵

In 1832, in answer to repeated requests of the assembly, the council in New Brunswick was divided into two bodies, a legislative and an executive council, as had been done in 1791 in Canada. Demands from

¹ A curious survival of the judicial powers of the governor's council still exists in Prince Edward Island, where it is still, legally, a divorce court. See Senator Ross, *S.D.* 1920, 165-9.

² 'I cannot learn that during the present or the two last reigns a single instance has occurred of a change in the subordinate colonial officers except in the case of death, resignation, incapacity or misconduct.' Russell to Thompson, Kennedy, *Documents*, 524.

³ Harvey, 'The Passing of the Second Chamber in Prince Edward Island.' *Can. Hist. Ass. Annual Report*, 1922, 23. Cf. also Hannay, *op. cit.* and Kennedy, *Documents*, 484.

⁴ Hannay, *op. cit.* 165-6.

⁵ 'Bills of the utmost importance . . . were frequently rejected by the council without being discussed.' Hannay, *Wilmot and Tilley*, 67-8.

In P.E.I. the council blocked a bill for the extension of the franchise. Harvey, *op. cit.* 24. Cf. also Howe's letters, Kennedy, *Documents*, 484.

Prince Edward Island and Nova Scotia for a similar change or for an elective council led to the same result in 1837, despite the opinion of Lord Glenelg, the Colonial Secretary, that the innovation in the Canadas and in New Brunswick 'had not been such as to exclude very serious doubts as to its usefulness.'¹ But the change was far from satisfactory. The assembly of New Brunswick complained in 1843 of the 'official influence' in the legislative council because of the number of officers of the Government therein. It requested that the number of office-holders in the council be limited, and that, in order to increase the independence of legislative councillors, membership should be 'during good behaviour' rather than 'during pleasure.'² Nova Scotia took up the same complaint.³ These requests were met only in part; the council in each province was increased to twenty-one, while the number of members holding office during pleasure was limited to seven, but the request for a life tenure was refused.⁴ In 1840, in the course of a dispute between the legislative council and the assembly in Prince Edward Island over the subject of responsible government, it was conclusively shown that the two councils were closely related by family connections and business interests.⁵ Thus the evils of executive control and class influence over legislation were not removed.

The Legislative Council in United Canada.

Parliamentary government was introduced into Canada by the adoption of the practices of ministerial responsibility which prevailed in England. It did not

¹ Lucas, *Durham's Report*, i. 80-4. Cf. also Kennedy, *Documents*, 486; Harvey, 'The Passing of the Second Chamber in Prince Edward Island,' *Can. Hist. Ass. Annual Report*, 1922, 25; Allison, *History of Nova Scotia*, 677.

² Bourinot, 'Legislative Council of Nova Scotia,' *Trans. Roy. Soc. of Can.* 1896, 153. Cf. also Hannay, *History of New Brunswick*, ii. 83 ff.

³ Bourinot, *op. cit.* 152.

⁴ *Ibid.* 154-7, 152.

⁵ Harvey, *op. cit.* 25-6.

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rest on statutory enactment.¹ The Act of Union of 1840 simply united the two provinces and provided the machinery of government already in existence in each, that is, a legislature of two houses, the lower elected and the upper appointed by the Crown, and an executive council legally appointed on the recommendation of the governor and responsible to him. As for the legislative council, no material changes were made in its structure or powers.² The decline in the power of the council which followed was not, therefore, due to the Act of Union ; it arose out of the introduction of parliamentary government. An irresponsible upper house, just as an irresponsible governor, was destined to suffer an eclipse with the development of a responsible executive.

The change to parliamentary government need concern us here only in so far as it affected the legislative council. Parliamentary government, in a word, meant simply the transfer of the executive and ministerial powers of government from the governor and an oligarchy of office-holders to the leaders of the majority in the assembly. Formerly the legislative council had been the bulwark of the executive against the assaults of the assembly. Now that the executive and the leaders of the majority in the assembly were one and the same the functions of the council were completely changed. Henceforth the council was to become the means of expressing the wishes of the majority in the lower house.

The council had never been independent of the executive ; nor was it under parliamentary government so long as appointment by the Crown remained. Formerly the executive had controlled the council in two ways : first, through usually appointing only those who were supporters of the governor and his

¹ For discussion of this see Keith, *Responsible Government in the Dominions*, i. 59 ff.

² Text of Act in Kennedy, *Documents*, 536 ff. The new provisions were disqualification for bankruptcy, insolvency, and conviction for other crimes than treason, and absence from the council in lieu of absence from the province. No reference to titles or honours occurs in the Act.

party, and secondly, through the fact that a majority of the council were office-holders. The second of these two evils now disappeared. The first appointments to the new council were made by Lord Sydenham, who took care that few office-holders were named. From among the judiciary only the vice-chancellor of Upper Canada obtained a seat; nor were any ecclesiastics appointed.¹ But though considerable care was taken to appoint only men of substance who were not office-holders, it is evident that the appointees were supporters and not opponents of the governor's policy. Out of a total of twenty-five eighteen were Conservatives and only five Reformers.² In 1843, in order to prevent a vote of 'want of confidence' in the Government, the new governor, Sir Charles Bagot, called the leaders of the Opposition into the Ministry, thereby setting the first precedent in Canada of ministerial responsibility to the lower house.³ The new administration appointed six members to the legislative council, one Conservative and five Reformers. The succeeding Ministry likewise took care to appoint a majority of its friends. Of the seven appointments made, five were Conservatives and only two Reformers.⁴ Formerly appointments to the council had been the outcome of patronage in the hands of the governor: now this patronage was in the hands of the party leaders.⁵ The only difference was that, because of ministerial changes, the council came to represent different political opinions, whereas the old councils represented but a single party.

¹ Kylie, in *Canada and Its Provinces*, v. 137.

² *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, Quebec, 1865 (hereafter cited '*Conf. Deb.*'), 238.

³ Kennedy, *Constitution*, chap. xv.

⁴ *Conf. Deb.* 238.

⁵ 'Now, . . . what was the spirit which actuated the appointments from 1841 to 1848. It was a spirit of partisanship.' Taché, in *Conf. Deb.* 238. 'Its members were, most of them, for some time, named from one side in politics. The gentlemen named by Lord Sydenham and his immediate successors were, undoubtedly, most respectable. There was nothing out of common course that I see about these appointments; they were party, political appointments of the ordinary kind.' Dunkin, in *Conf. Deb.* 495.

The change to parliamentary government reduced the council to impotence. There was nothing to keep the executive from resorting to the expedient of 'swamping' the upper house with new members favouring the majority in the assembly. It was doubtful, however, whether the governor would consent to such an exercise of the prerogative in the interests of a colonial party. The test came in 1849 under Lord Elgin, when the Reform Government introduced the Rebellion Losses Bill—a measure to compensate those who had lost property during the rebellion in Lower Canada¹—and found its policy opposed by a hostile majority of fifteen in the upper chamber. There were loud outcries from the old loyalist party that the measure was an attempt to compensate rebels. The opinion of the party was so strong against the proposal that it was certain to use its majority in the upper house to throw it out. The Government took advantage of the fact that permission had already been granted to increase the size of the council, and applied to the governor, Lord Elgin, to appoint twelve new councillors. The governor acquiesced, and the council passed the Bill.² For all practical purposes Canadian government had now become that of a single chamber.

The council fell rapidly into disrepute. Upon it even its traditional supporters, the Tory element, heaped abuse. Shorn of power and receiving no salary, the councillors themselves ceased to take their duties seriously. In 1846 the average attendance had been only fifteen out of a total of thirty-four members,³ but after the passing of the Rebellion Losses Bill attendance fell to such a disgracefully low figure that it was difficult to carry on business. A few years later a prominent member of the council described the situation as follows :

' Session after session, week after week, we saw the Speaker come into the Council with great pomp . . . and after the

¹ Kennedy, *Constitution*, 257 ff.

² Taché, *Conf. Deb.* 238.

³ Kylie, in *Canada and Its Provinces*, v. 137.

Speaker had made his usual dutiful bow to the throne, he would take his seat and remain quietly in the chair for the space of one hour. At the end of the hour he would consult his watch, and saying there was no quorum present—although the quorum was a very small one, being ten members only—he would declare the House adjourned to the following day. . . . The government of the day had to employ all sorts of means to induce the hon. gentlemen to attend in their places. The prestige of the Legislative Council had gone, and the members, notwithstanding the offer to pay their expenses, &c., remained at home, and the business of the country suffered very much. Towards the end of the session we could muster a few gentlemen. But they did not take much interest in the business of the country, in fact they were disgusted with it, and they got through legislation at railroad speed.’¹

The council now had few friends and many enemies. Radicals and reformers, despite the fact that the will of the majority of the electorate was now supreme in the internal affairs of the province, continued their demands that the council be made elective, on the ground that it was an undemocratic institution.² Conservatives, and even Lord Elgin,³ were driven to the same conclusion for the reason that the existing council was useless. Again, as so often, the traditions of British and American history directed the development of Canada’s institutions. It does not seem to have occurred to anyone of note that government might be possible under a single chamber. The system of appointment—the system most nearly akin to the British practice of recruiting the Lords from the ranks of party supporters—having failed to create a useful upper chamber, the people and their leaders now turned to the American method of election.

¹ Taché, *Conf. Deb.* 239.

² Taché, *ibid.*

³ Elgin advised the change as early as 1848. His scheme was that the electorate for the council should consist of those who held public office as members of the assembly, mayors of towns and cities, municipal councillors, etc. Members were to be elected for life. The governor might grant dissolution of the council in case of a deadlock after a Bill had been carried in the assembly for two successive sessions. Elgin dropped this scheme, however, for the straight elective principle with the same electorate as the assembly. Kylie, *op. cit.* 139 ff.

Accordingly, in 1853 the assembly passed an address with a draft bill appended looking to changes in the council. The proposed measure provided for the election of a council of thirty members from each half of the province. As in the Senate of the United States, one-third of its members were to retire every two years. In the case of a deadlock after a bill had passed the assembly in two successive sessions at least six months apart, and, in the last instance, by an absolute majority of all the members of the assembly, the council could be dissolved by the governor. Membership was to be confined to natural-born or naturalized citizens over thirty years of age and possessed of property to the value of at least one thousand pounds. The British Cabinet, however, had already become so converted to the principles of colonial self-government that they declined to pass the desired amendment to the Act of 1840 to constitute the new council. They preferred to leave Canada to settle her own constitutional problems, and, instead, passed in the following year an enabling Act.¹

In 1855 a bill, much the same in principle as the draft bill appended to the address, was introduced in the Canadian assembly. This provided for a council of forty-eight members, twenty-four from each province, who should be elected for a term of eight years, one-fourth retiring every two years. This bill took care of the rights of the members of the existing council by providing that they should be replaced by elected members only as their seats fell vacant. The requirements of the previous bill respecting property and age were again included. One important change, however, was made. The provision for dissolution was omitted with the expectation that the council would thereby become more independent.² The bill passed the assembly by eighty votes to four. In the council it was amended in several particulars, notably the property qualification, which was increased from one

¹ Kylie, in *Canada and Its Provinces*, v. 139 ff.

² *Ibid.* 144.

thousand to two thousand pounds. Finally, in 1856 the bill was accepted by both houses.

The introduction of new blood into the council was a comparatively slow process, so slow indeed that by 1864 twenty-one life members remained.¹ Even so, the council revived rapidly. In 1859 it was granted the right to elect its own Speaker.² The same year it held up the Supply Bill on the pretext that it contained no provision for removing the government to Quebec, as custom required. The fact was that the council had been expecting this provision in the bill and had intended to test its power to amend money bills by striking it out, and though the item in question was omitted it determined to assert its powers in any case, and opposed the bill in its entirety.³ Only after the Government had brought some absent life members from Québec did the bill pass.⁴ In the debate on supply the following year a motion against a clause abolishing canal tolls was introduced. A conflict between the houses was saved by the Speaker's ruling that the bill was out of order.⁵ It was asserted in the debates on federation in 1865 that it had been 'freely discussed in the corridors' that the council had full rights to initiate money bills.⁶ Nor was this statement challenged throughout the debate. The fact was that the elected members of the council in encroaching on the field of finance felt themselves the representatives of the people equally with the lower house, and just as responsible to the people for public expenditure and the whole administration of government. They were quickly becoming a second master of the Ministry.

Moreover, the elective system tended to place in the upper house the type of ambitious politician who was attracted to the lower house. Only men of wealth,

¹ Macdonald, *Conf. Deb.* 37.

² Kennedy, *Documents*, 594.

³ Dent, *The Last Forty Years*, ii. 395.

⁴ *Conf. Deb.* 117.

⁵ Kylie, in *Canada and Its Provinces*, v. 145.

⁶ Campbell, *Conf. Deb.* 23.

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of energy and ambition, would undertake the difficult task of a campaign in the large constituencies which were required for the election of councillors. The quieter, more judicial type of citizen objected to the clamour of the hustings and refused to stand, or if he stood he met defeat at the hands of his more aggressive opponent.¹ Thus the council tended to be a second edition of the assembly, and because smaller in numbers and composed for the most part of citizens who had already made their mark in life, it might in the end have overshadowed the assembly, just as the Senate of the United States has overshadowed the House of Representatives.

Consequently, there was much doubt when federation was under discussion as to the desirability of a second elected chamber. It is not without significance that the resolution for the appointment of members of the upper house by the Crown was introduced into the conference at Quebec in 1864 by John A. Macdonald who had been a supporter of the elective principle in 1856.² In the debates in the Canadian Parliament on the subject of federation Macdonald admitted that the elective system 'did not so fully succeed in Canada as we had expected.'³ Langevin declared that 'in Lower Canada we have become tired of the system.'⁴ George Brown, who almost alone of his party had voted against its introduction in 1856, said: 'I have lived to see a vast majority of those who did the deed wish it had not been done.'⁵ It was declared in the council by a member opposed to the change that practically all the Canadian delegation were opposed to election before they went to Quebec.⁶ It was quite evident, therefore, that Canadian politicians had undergone a change of heart.

¹ *Conf. Deb.* Campbell, 22; Belleau, 185; Taché, 240; Macdonald, 35-6; Langevin, 373.

² Pope, *Confederation Documents*, 11.

³ *Conf. Deb.* 35-6.

⁴ *Ibid.* 373.

⁵ *Ibid.* 88.

⁶ *Ibid.* 166.

The approach of federation found the problem of second chambers unsettled throughout all the provinces. Prince Edward Island had also recently adopted the elective system, and was still so enamoured of it that, alone of all the provinces, it pressed for its introduction into the constitution of the new Dominion.¹ New Brunswick had secured permission from the British Government in 1851 to make its council elective, but the proposal had been blocked by the council itself. No effort was made, however, to 'swamp' the council or to carry the proposal in subsequent years. Apparently New Brunswick's attempt at reform was only half-hearted.² But in all the provinces the principle had been established that the Ministry was responsible only to the lower house. Consequently, the upper house had become not merely a second, but a secondary chamber as well. The problem, then, in the new constitution was to construct a second chamber which should not be strong enough to control the Ministry, but which should be sufficiently powerful and sufficiently conscientious and independent to perform those indefinite functions which people dimly felt were required of a second chamber by the British system of government, and no more.

¹ *Conf. Deb.* 35.

² Hannay, *History of New Brunswick*, ii. 138.

III

THE INTENTIONS OF THE FATHERS

THE federation of Canada in 1867 was the result of a variety of causes.¹ The proposal had been mooted almost at the time of the birth of the American Union,² but it did not become a matter of practical politics until about 1860, when the force of circumstances drove the various provinces into each other's arms. There were three causes in particular: the breakdown of government in United Canada, the American Civil War, and the desire for greater commercial and railway facilities.³ Of these we are concerned only with the first two because they exercised a profound influence upon the constitution of the new Dominion.

Parliamentary government in Canada had failed to be a panacea for all political ills. Friction between the people's representatives and the representative of the Crown had ceased, but the racial struggle still continued under the evil influence of the Act of Union. The Act had united Upper and Lower Canada on equal terms, giving to each equal representation in the assembly, though the population of Upper Canada was at that time much smaller than that of the lower pro-

¹ See Kennedy, *Constitution of Canada*, chaps. xvii and xviii.

² See Chief Justice Smith to Dorchester, 1790: Kennedy, *Documents*, 203 ff.

³ 'The object of the Conference was to do away with some of the internal hindrances to trade, and to unite the Provinces for mutual defence.' See E. P. Taché in opening address at Quebec Conference. A. A. Macdonald's *Notes*, Doughty (ed.), *Can. Hist. Rev.* vol. i. p. 27.

vince. The steady stream of immigration into Upper Canada soon gave it the lead in numbers. The shoe was now on the other foot, and the demand arose in Upper Canada for 'Representation by Population.' Equal representation, at first a grievance of Lower Canada, now became its bulwark against the aggression of its English partner, and it refused to yield the advantage. The Act of Union had wedded an old established colony to a young, progressive partner with the avowed purpose that the younger should convert its mate to the English way of life. The result, as might have been expected, was an ill-matched pair. The two were diametrically opposed; they represented two distinct races, two aggressive types of religion, and two persistent languages. The nationalism of Quebec, far from being extinguished, flourished under parliamentary government. The demand for representation by population had an unfortunate origin, since it arose among the 'Clear Grits' of Upper Canada who were led by George Brown, the editor of *The Globe*, a bitter anti-Catholic and anti-French organ. Consequently, the louder the cry for 'Rep by Pop' grew in the upper province, the closer together drew the ranks of Lower Canada. The two provinces were no nearer fusion than they had been in 1840. The struggle for parliamentary government had temporarily united the reformers in both provinces, but there were now no political principles which could bridge permanently the racial chasm. Parties, therefore, disintegrated into shifting groups. Government followed Government in a vain attempt to carry on the Queen's business, but neither race would sell its birthright for the pottage of stable government.¹

The breakdown of government in Canada caused men to look to a larger union where the obstacles to stable government would be absent or would be over-

¹ The Act of 17 and 18 Vic. c. 188 (1854) permitted the Parliament of Canada to change the equality of membership without the requirement of a two-thirds vote which the Act of Union had required, but it was never acted upon. For the Act see Kennedy, *Documents*, 592.

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come. The essential difficulty was racial. Either Lower Canada must be submerged or it must be left to itself without interference from English Canada. From the first the idea of overwhelming Lower Canada by the creation of a unitary state appeared an impossibility. The only alternative, then, was a federal state in which Lower Canada should be protected in all its rights. Lower Canada must be a willing partner to any scheme of union since geographically it held the key to any union with the Maritime Provinces. And it could only be made a willing partner by the grant of absolute guarantees for the protection of its institutions, its language, its religion, and its laws—guarantees that must be clearly evident to all.

Race, language, and religion made of British North America two distinct sections; geography added a third in the Maritime Provinces—New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland. Between these provinces and Canada lay long reaches of water or of sparsely settled territory. Their combined population was about a third of that of Canada,¹ to which they were bound only by the slightest of economic and strategic ties and by a common sentiment of loyalty to the British Crown. Though politically four units, they were drawn together by the same economic interests; these were essentially maritime, and differed from the economic interests of Canada, which were largely those of an inland province. Moreover, each of the provinces had political institutions, customs and laws peculiar to itself, and to these each was sentimentally attached. Any scheme of union, then, if it was to include the Maritime Provinces, must include adequate guarantees for them as well as for Lower Canada.

The second cause which we have mentioned, the

¹ John A. Macdonald gave the following figures of population in the conference at Quebec: Upper Canada, 1,600,000; Lower Canada, 1,200,000; Nova Scotia, 350,000; New Brunswick, 260,000; Prince Edward Island, 85,000; Newfoundland, 125,000. A. A. Macdonald's *Notes*, 31.

American Civil War, had a profound influence upon Canada. From the outset of the war relations between the North and Great Britain were strained, and Canadians were brought face to face with the startling fact that in case of war they would be the immediate sufferers. Further, no one could say how far Great Britain would be able to aid them, or indeed, how far she would be willing to aid them.¹ Union offered some prospect of defence.

But the Civil War had another influence. It disclosed to Canadians the weaknesses of the American Federation, especially its centrifugal tendencies. Canadians were faced with the fact that the provinces were divided by greater barriers than those between the North and the South. Whereas the North and the South were separated by differences in their social and economic organization, Lower Canada differed from its sister provinces in race, religion, and language, and the Maritime Provinces were cut off from Upper and Lower Canada by hundreds of miles of thinly populated country not as yet crossed by a single line of railway. In the proposed union centrifugal tendencies were fostered by nature to a much greater extent than they had ever been in the United States. The evils of sectionalism must, therefore, be guarded against. 'We must,' said John A. Macdonald in the preliminary discussions at the conference at Quebec in 1864, 'have a strong Central Government with all authority except what is given to the local governments in each Province, and avoid the errors of the American Constitution.'²

In 1864, the *annus mirabilis* of Canadian history, federation became an issue in practical politics. The threat of war between Great Britain and the United

¹ 'As to defence we all know the position England has assumed towards us. Separated as we are we cannot defend ourselves. Cobden and Bright say what is the use of sending an army to defend Prince Edward Island. It would be a question if England would send an army or bring the power of Britain to defend any Province from invasion.' G. E. Cartier, A. A. Macdonald's *Notes*, 28.

² *Ibid.* 32.

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States had driven home to the Maritime Provinces their insecurity, and they agreed to send delegates to meet in September at Charlottetown to discuss proposals for a maritime union. To Canada, where government had virtually broken down, the proposed conference was a welcome gesture, and the Canadian government obtained permission to send delegates. After a brief preliminary discussion the conference adjourned to meet in Quebec in the following month. Seventy-seven years earlier, another conference, faced with similar problems, had met in Philadelphia, and the work of this conference was not lost upon the statesmen who gathered at Quebec. Even at Charlottetown it had been agreed that, if the union were consummated, the central government must be a strong one. To this end it had been further agreed that the powers of the provincial governments should be enumerated, while the 'reserved' powers should belong to the general government and not, as in the United States, to the local governments. And yet, while a strong central government seemed necessary to secure a permanent union, the exigency of the moment demanded that sectional fears be allayed by providing strong safeguards for provincial and sectional interests. Otherwise, the child would be strangled at birth. The problem of constructing the new Dominion was, therefore, a problem in the nice adjustment of centripetal and centrifugal tendencies.

The key to federation lay in securing adequate guarantees for the protection of provincial and sectional rights. It seems to have been generally understood that since the union must be ratified in an Act of the British Parliament the Act would be subject to interpretation by the courts as was the Constitution of the United States, and that through this the provinces would have judicial protection against the encroachments of the central government.¹ Yet because it

¹ Henry (N. S.), Dickey (N. S.), Brown (U. C.), A. A. Macdonald's *Notes*, 43-4; John A. Macdonald, *Pope's Documents*, 55.

was proposed to strengthen the central government by giving it the 'reserved' powers in the field of legislation, while the powers of the provinces were to be enumerated, and because the appointment of all the judges of the higher courts would rest with the central government, judicial protection for the provinces seemed insufficient. There appeared to be all the more room for encroachment by the central government upon the rights of the smaller provinces or of any one section, and consequently all the more need for securing to the provinces and the sections the means of influencing the politics and legislation in the federal Parliament. The practical difficulty was the adjustment of representation, just as at Philadelphia. On the proportion of representation which any province or section should obtain in the federal Parliament would largely depend the influence that it could exert upon federal politics. It was generally agreed that representation in the lower house should be on the basis of population, since on no other condition would Upper Canada have entered the scheme. The question shifted, therefore, to the construction of the upper house. The importance of this question in the minds of the statesmen at Quebec may be gleaned from the fact that practically the whole of six days out of a total of fourteen spent in discussing the details of the scheme were given over to the problem of constituting the second chamber. Here, as at Philadelphia, the particularism and the fears of the smaller provinces lay at the basis of the difficulties.

The essential features of the proposed upper house were outlined by John A. Macdonald on the second day of the conference.

'Now as to the Constitution of the Legislature we should have two Chambers, an Upper and a Lower House. In the upper house equality in numbers should be the basis, in the lower house population should be the basis. . . . The mode of appointment to the Upper House—Many are in favour of election and many are in favour of appointment

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by the crown. . . . I am after experience in both systems in favour of returning to the old system of nomination by the crown. . . . There should be a large property qualification for the Upper House which is then the representative of property.'¹

Two days later he introduced the first resolution on the constitution of the upper house. It was that the legislative council should represent equally the three divisions, Upper and Lower Canada, and the Maritime Provinces.² This motion eventually crystallized into a further resolution that twenty-four members should be the number allotted to each section.³

These motions were strenuously opposed for a time by the Maritime Provinces, particularly by Prince Edward Island. Their position was that 'the only safeguard the smaller Provinces would possess was in the Council,' as representation on the basis of population had been granted in the lower house.⁴ Prince Edward Island raised the demand for equal representation for all the provinces in the upper house, but the proposal was not entertained.⁵ Eventually the resolution passed by the omission of Newfoundland from the Maritime Provinces, with the understanding that should it enter federation it should be allowed four members in the upper house with the right to press for more.⁶ The twenty-four members allotted

¹ A. A. Macdonald's *Notes*, 31.

² Pope's *Documents*, 11 (Oct. 13).

³ Pope's *Documents*, 14 (Oct. 17). A. A. Macdonald states that both motions were introduced as one on the 13th, p. 33.

⁴ A. A. Macdonald's *Notes*, 34.

⁵ *Ibid.* 35.

⁶ The position of Newfoundland in the conference is somewhat obscure. A. A. Macdonald records speeches from Newfoundland delegates on the opening day. Pope's *Documents* record a motion of John A. Macdonald on the 17th to admit Newfoundland delegates, and that Newfoundland 'be now invited to enter into the proposed confederation, with a representation in the Legislative Council of four members.' Apparently these were to be additional to the twenty-four assigned to the Maritime Provinces. On the same day, according to both A. A. Macdonald and Bernard's *Minutes* (Pope's *Documents*), a discussion on the general resolution for a federal government was received, provision being made for the admission of the North-West territories, British Columbia, Vancouver and Newfoundland. See footnote to Macdonald's *Notes* by Doughty, p. 35.

to the Maritime Provinces were divided on the basis of ten each to Nova Scotia and New Brunswick and four to Prince Edward Island. According to a Prince Edward Island representative his province alone disagreed with the resolution in its final form.¹

The basis of representation in the upper house was the great compromise of the conference, just as it had been in the convention of the American States at Philadelphia. At Philadelphia the compromise was equal representation in the upper house for the states, at Quebec it was equal representation for the three sections. It was the key to federation, 'the very essence of the compact,' said George Brown. 'Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they could have equality in the Upper House. *On no other condition could we have advanced a step.*'² It is of the utmost significance that when Prince Edward Island refused to come into federation the twenty-four members allotted to the maritime section were divided equally between New Brunswick and Nova Scotia, and thus the compact of equal representation was not broken. On the admission of new provinces and new territory in the West additional senators were added from time to time. But by the British North America Act of 1915 the West became recognized as a distinct section and was allotted a representation of twenty-four members equally with the other sections, six senators being assigned to each of the four western provinces.³

From the compromise another important feature resulted. The upper chamber must be limited in numbers; there must be no possibility of 'swamping' it with new members to carry any measure against the wishes of a particular section or province. When the proposal was made to allow increase of the council at

¹ A. A. Macdonald says P.E.I. voted against the proposal, Bernard that it was carried unanimously. A. A. Macdonald, *Notes*, 35.

² *Conf. Deb.* 88. Italics mine.

³ Kennedy, *Documents*, 706.

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the pleasure of the Crown, delegates from Prince Edward Island and others objected on the ground that this was striking at the very roots of the agreement. 'The limitation of numbers in the Upper House,' said George Brown, 'lies at the base of the whole compact on which this sch \acute{e} me rests. It is perfectly clear, as was contended by those who represented Lower Canada in the Conference, that if the number of the Legislative Councillors was made capable of increase, you would thereby sweep away the whole protection they had from the Upper Chamber.'¹

The rigidity of the upper chamber was subsequently attacked by the Opposition in the Canadian Parliament. It was, said Christopher Dunkin, 'a cleverly devised piece of deadlock machinery, and the best excuse made for it is that it will not be strong enough to do near all the harm it seems meant to do.'² The Government defended it on the ground that it was the only possible alternative to the breakdown of the whole system,³ and that the possibility of a stand by the upper house against the will of the people was an imaginary fear. The council would be composed of citizens

¹ *Conf. Deb.* 89.

² It was advocated by some delegates to allow the Crown to add to the number of Legislative Councillors at any future time as they might deem necessary, but this was objected to by the Prince Edward Islanders and some others as it would destroy the equilibrium established between the provinces and would be difficult to work out in practice.' A. A. Macdonald's *Notes*, 36.

Tupper: 'In the Maritime Provinces we felt that the great preponderance of Canada could only be guarded against by equal representation in the Legislative Council. If an increase could be made by the Crown it might disturb the relative proportions.'

Tilley: 'I agree with Dr. Tupper. . . . The objection was that Upper Canada would swamp the Lower Provinces. What is the Crown? The Government of the day.'

Langevin: 'If you give power to swamp the Legislative Council then you destroy its utility. Lower Canada insists that each of its present divisions shall have a representative in the Council, that is the existing divisions. If you give power to the Central Government to increase the number you change the proportions. This has been settled to the satisfaction of Roman Catholic and Protestants, British and French.' Pope's *Documents*, 118, 119.

These quotations are from the discussions which arose at Westminster over the proposal to change the scheme to provide for the solution of deadlocks.

³ *Conf. Deb.* 496.

³ *Ibid.* 21.

whose interests would correspond with the general interests of the community; they would represent no special class.¹ Moreover, even should the second chamber oppose the majority of the people's representatives the changes wrought by time in its membership would be rapid. It was pointed out that in eight years since the introduction of the elective system in the existing legislative council half of the nominated members had died.² A deadlock, if such should happen, would be a temporary matter.

It was argued further that a chamber with a fixed number of members, appointed for life, would have an independence which the nominated council of United Canada had lacked. 'No Ministry,' declared John A. Macdonald, 'can in the future do what they have done in Canada before—they cannot with the view of carrying any measure, or strengthening the party, attempt to overrule the independent opinion of the Upper House by filling it with a number of its partisans and political supporters. . . . The fact of the government being prevented from exceeding a limited number will preserve the independence of the Upper House, and make it, in reality, a separate and distinct chamber, having a legitimate and controlling influence in the legislation of the country.'³ 'The desire,' said George Brown, while justifying the rigidity of the upper chamber and life appointments, 'was to render the Upper House a thoroughly independent body—one that would be in the best position to canvass dispassionately the measures of this House.'⁴

The original plan, which provided no solution for deadlocks between the two houses, did not meet with the approval of the British Government, and the whole question came up again at the Westminster Conference.⁵ The first draft of the bill which was to be submitted

¹ *Conf. Deb.*: Cauchon, 572; John A. Macdonald, 36-7; Campbell, 22-4.

² Campbell and Macdonald, *ibid.*

³ *Conf. Deb.* 118.

⁴ *Ibid.* 90.

⁵ Pope's *Documents*, 111 ff.; also Senator Wilmot, *S.D.* 1877, 202-3.

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to the British Parliament accordingly proposed as an alternative that the first members should hold their seats for ten years, but after that should retire by rotation, three members from each section each year.¹ This was dropped, however, in the third draft, which provided instead that the upper house should have only a suspensive veto. It might reject a money bill once and another bill three times, and if such bills were passed by a majority of the representatives in the lower house from two of the three sections of the Dominion, the upper chamber might then be 'swamped' by the addition of new members, which increase must be composed of equal numbers from each of the three sections. This was also dropped, the fourth draft containing the provision, which became a part of the constitution, that with the sanction of the British Government three or six additional members might be added on condition that each of the three sections should be equally represented in the increase.² This was the only 'safety-valve' provided in the constitution for the solution of difficulties between the houses. It was, in principle, continued by the Act of 1915, which recognized Western Canada as a distinct section of the Dominion in its representation in the Senate. Four to eight extra members may now be added with the sanction of the British Government, but each section must have equal representation in the increase. Nor may new members be added afterwards to the Senate for any section until its representation is reduced to the normal number, twenty-four, except by special permission of the British Government.³ Thus, even in the 'safety-valve,' limited though it is, equal representation of the sections is required, and the sectional character of the Senate is preserved.

Yet the provision for the representation of sectionalism was more apparent than real. Popular election

¹ Pope's *Documents*, 143.

² *Ibid.* 162.

³ Kennedy, *Documents*, 706. The 'safety-valve' has never been used. See p. 136.

as a method of constituting the upper chamber was dropped in the Quebec Conference with little opposition except from Prince Edward Island.¹ The chief objections to it were that it tended to create two Houses of exactly the same character which were both likely to consider themselves the interpreters of the popular will, and that such a condition would inevitably lead to conflicts between the Houses.² In addition, it was un-British.³ But there was a more serious objection from the Maritime Provinces and from Quebec. The elective system would probably lead to the demand for representation by population in the upper house as well as in the lower, a result which would strike at the very roots of the compromise.⁴ Nor was appointment by provincial governments or election by provincial legislatures seriously entertained or urged except by Prince Edward Island.⁵ While there was considerable difficulty about the first selection of members to the upper chamber there was little opposition to the system of appointment by the federal government. In the first instance, it was agreed that nominations were to be made by the provincial governments and that all parties should be represented in such nominations,⁶ but no restrictions were attached to any subsequent appointments by the federal government, except that appointees must be residents of the sections for which they were appointed, and, in the case of Quebec, residents of particular districts.⁷

With our experience of half a century sectional representation and nomination by the central government seem irreconcilable in principle. It is probable that Macdonald and other leaders who favoured a

¹ 'We found a general disinclination on the part of the Lower Provinces to adopt the elective principle; indeed, I do not think there was a dissenting voice in the Conference against the adoption of the nominative principle, except from Prince Edward Island.' John A. Macdonald, *Conf. Deb.* 35.

² Mackenzie, *ibid.* 426; Macdonald, *ibid.* 35; Campbell, *ibid.* 23.

³ Macdonald, Pope's *Documents*, 58.

⁴ Campbell, *Conf. Deb.* 21.

⁵ A. A. Macdonald's *Notes*, 36-7.

⁶ Resolution 14, Pope's *Documents*, 40.

⁷ Resolution 16, *ibid.*

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strong union were convinced of this also, and saw in appointment by the federal government the means of weaning the sections from their particularism.¹ They granted the forms demanded by sectional sentiments and fears, but they made sure that these forms should not endanger the political structure. Their success in driving the bargain was due principally to two causes : first, to the desire on the part of all public men to escape the pitfalls of the American Constitution which the Civil War had shown, and secondly, to the belief that the sectional representatives in the lower house of the Dominion Parliament would control the appointments to the upper chamber. To the taunt that the rights of Lower Canada were being bartered away, Cartier, the leader of the French-Canadian section of government supporters, replied that there were adequate safeguards. Would not Lower Canada have a leader in the new Parliament just as she had under the existing system, and would this leader not control all appointments for Lower Canada just as he did now ? ' You will be in a minority,' objected a member of the Opposition. To this Cartier replied :

' Am I not in a minority at present in appointing the judges ? And yet when I propose an appointment of a judge for Lower Canada, is he not appointed ? . . . When the leader for Lower Canada shall have sixty-five members belonging to his section to support him . . . will he not be able to upset the Government if his colleagues interfere with his recommendations to office ? This is our security.' ²

Sir Narcisse Belleau expressed much the same opinion :

' The influence of Lower Canada will enable her to make and unmake governments at pleasure when her interests are at stake or threatened. And if the importance of this responsibility of the Federal Government were well understood, there would be no anxiety about our institutions. . . .

¹ Sir Charles Tupper declared that only one delegate, Oliver Mowat, objected seriously to appointment by the Crown, and even he did not challenge a vote. *Recollections*, 41.

² *Conf. Deb.* 571.

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The elective principle as applied to the Legislative Council becomes unnecessary in view of the numerical strength of Lower Canada in the Federal Parliament, for the House of Commons is the body that will make and unmake ministers. . . . The safety of Lower Canada depends not on the elective principle, but on the responsibility of the members of the Executive to the House of Commons.' ¹

In a similar strain John A. Macdonald, discussing the equality of the sections in the upper house, declared :

' It will, therefore, become the interest of each section to be represented by its very best men, and the members of the Administration who belong to each section will see that such men are chosen, in case of a vacancy in the section.' ²

From such statements it is clear that the Fathers of the federation did not expect that the Senate would be the chief line of defence for the protection of provincial or sectional rights. The first great check on the central government would be in the federal nature of the Cabinet ³ ; the upper house would be only a last means of defence. That the upper house would be a useful check, that it would be filled with men who were sympathetic and not antagonistic to the views of their respective sections, would be assured by the fact that the sectional representatives in the Cabinet would control appointments.

Another objection to appointment by the Crown was that the system meant party appointments. The statesmen of the day were not blind to the fact that appointment by the Crown was simply a polite way of providing for appointments by the leaders of the party who were in power. ' What is the Crown ? '

¹ *Conf. Deb.* 185.

² *Ibid.* 38.

³ It was generally held, even by the Opposition, that the Cabinet would be a federal body. ' It is admitted that the Provinces are not really represented to federal intent in the Legislative Council. The Cabinet here must discharge that kind of function which in the United States is performed in the federal sense by the Senate. And precisely as in the United States, wherever a federal check is needed, the Senate has to do a federal duty as an integral part of the Executive Government. So here, when that check cannot be so got, we must seek such substitute for it as we may in a federal composition of the Executive Council.' Dunkin, *Conf. Deb.* 497.

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asked Tilley, 'the Government of the day.'¹ Said Reesor in the debate in the council :

' We know what the tendency was in England, and what it was in this country when the Government had the appointment . . . of the Legislative Council ; the effect will be to find a place in this house for men distinguished for the aid they have given at elections to certain men or parties and not as a reward of true merit or legislative ability.'

This, he contended, would rob the upper house of independence. Partisan appointments would mean cordial support by the person named of the Government which had appointed him, and obstruction to another party when it succeeded to office. Thus the government of the country would alternate between virtually a single chamber and deadlock.² And, indeed, there was every warrant that appointments would be partisan. The Prime Minister, Mr. Taché, in a review of the history of the legislative council of United Canada, condemned the appointments as being made ' in a spirit of partisanship.'³

How then was it proposed to guard against this danger ? It was suggested by some, with a fine disregard of history, that parliamentary government offered a solution. Macpherson thought the proposed method would result virtually in indirect election by the lower house.⁴ Even George Brown contended that it was sufficient for the Ministers who made the appointments to be responsible to the lower house as they were for other executive acts.⁵ Such statements ignored the fact that parliamentary government meant government by party. It was not to be expected that Ministers would overlook their friends in making appointments. Indeed it was not contended, even by the Government in defending the scheme, that such would be the case, except in the first appointments which were specially provided for by the resolutions.

¹ Pope's *Documents*, 118. See note p. 40.

² *Ibid.* 331.

³ *Ibid.* 238 ff.

⁴ *Ibid.* 149.

⁵ *Ibid.* 89.

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That party considerations would govern subsequent appointments was freely admitted in the debate in the legislative council.¹

When it was pointed out by the Opposition in the lower house that the scheme offered no security that any but government supporters would be appointed, except in the first selection, the Government again tacitly admitted the charge.² Similarly Macdonald, while defending the proposed upper house against the criticism that it would be a source of deadlock between the houses, declared that in such cases the government of the day would make all appointments 'with the object of maintaining the sympathy and harmony between the two houses.'³ There can be little doubt from such admissions that the Government clearly intended that appointments should, after the first selection, be filled on the 'spoils system.' Nor is there any evidence in the reports of the discussion at Quebec or at Westminster that the leaders were deluded by the vain hope that after the first selection Oppositions would be recognized in appointments to

¹ *Reesor* : . . . ' But under the system of appointment there is another evil—the government of the day is particular in appointing those who are political friends of their own and have aided them at elections or in ways which may not be very creditable. . . . '

Campbell (Commissioner of Crown Lands) : ' Does the hon. gentleman suppose that members of this House will owe their nominations to the political services they can render in this House ? '

Reesor : ' Not solely, but rather to their political services at elections and otherwise before their nomination. The hon. gentleman remembers a certain little domestic arrangement he made on the other side of the House, while in Opposition, in which he had many warm friends. Does he expect to forget these ? '

Campbell : ' I hope not. ' (Hear, hear.)

Reesor : ' Well, there it is. The hon. gentleman acknowledges his determination to reward his political supporters. Is this the way to secure an independent branch of the Legislature, one that will operate as a wholesome check on hasty legislation ? ' *Conf. Deb.* 166.

² *Conf. Deb.* 570.

³ *Ibid.* 38. Prof. Kennedy's statement (Kennedy, *Constitution*, 413) that Macdonald declared that the Senate would not be filled by ' partisans and political supporters ' is unwarranted. Prof. Kennedy takes the quotation out of its context. Macdonald is referring to ' swamping ' to carry a measure. See *ante*, p. 41, for full quotation.

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the upper chamber, or in fact that any other method would be followed.¹

The public men of 1865 were, however, too near the events of their time to realize the evils of partisan appointments to a house of limited numbers. The brief period of parliamentary government through which Canada had passed, rich though it was in political experience, did not forecast the times of political development after federation. It was the heyday of the legislature's power, the time when the lower house actually made and unmade Governments. The Ministry was the servant not the master of the lower house. It reflected its changing moods, its fitfulness, its uncertainty. But federation brought a change; henceforth the Prime Minister and his Cabinet were to be the real governors and not the House of Commons. Even the Cabinet was to be overshadowed by the Prime Minister, who, by means of an enormous patronage put at his disposal by federation, would bestride the political world 'like a great Colossus.' Experience foretold none of these things to the statesmen who framed the constitution. None dreamed that for the next thirty years the country's destiny would remain, except for a brief period of four years, in the hands of a single party. Before 1865 a Government's life was measured by months, afterwards by decades. Such changes had profound effects upon the upper house; in the first place, under a powerful Prime Minister the representatives in the Cabinet of the various sections tended to have less control over appointments than was expected, and senatorships passed into the hands of the Prime Minister virtually as his personal patronage; in the second place, the long periods of office enjoyed by both parties has

¹ William MacDougall, one of the delegates to Quebec, subsequently declared that there was 'a clear understanding by the framers that appointments should be made equally from both parties' (*The Week*, Toronto, Oct. 18, 1888), but there is no evidence in the Debates or Documents for such a statement. The presumption is that if this were so the Canadian Government would have used it as an argument for the scheme, which they did not. MacDougall's statement is, therefore, untrustworthy.

tended to make the Senate at times the preserve of a single party. Neither of these results was foreseen in 1865.

In the main, the leaders built with the usual British political tools—precedent and compromise. Precedent conveniently supplied them with the institution of a second chamber. In the whole debate in the Parliament of Canada Alexander Mackenzie alone seems to have pressed the idea that parliamentary government could be carried on by a single chamber. It was his opinion that second chambers arose out of feudalism and that they tended to decline in importance with the spread of democracy. In modern times their only function was to protect the interests of a class such as the Lords in England, but where no special class existed, as in Canada, he failed to see the necessity of a second chamber. But, he added, the question was not 'what is the best possible form of government according to our particular opinions, but what is the best that can be framed for a community holding different views on the subject.'¹

Though the Senate was based on practical considerations rather than on theory, there were fairly definite ideas as to the functions of the upper chamber. Ostensibly its first duty was to protect the provinces and the sections, but it was intended to have other functions. Alexander Mackenzie thought its only practical use would be that of a 'court of revision,'² but there were few who trusted democracy as far as he. It was more generally believed that the Senate should be a check upon the lower house.

'We ought,' said Cauchon, 'to place in the constitution a counterpoise to prevent any party legislation, and to moderate the precipitancy of any government which might be disposed to move too fast and go too far—I mean a legislative body able to protect the people against itself and against the encroachment of power.'³

Cartier declared :

"The weak point in democratic institutions is the leaving

¹ *Conf. Deb.* 426.

M.S.C.

² *Ibid.* 425.

D

³ *Ibid.* 572.

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of all power in the hands of the popular element. The history of the past proves this to be an evil. . In order that institutions may be stable and work harmoniously there must be a power of resistance to oppose the democratic element.'¹

Macdonald said :

' There would be no use of an Upper House if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body.'²

In addition to being a check upon the lower house it was generally admitted in the Conferences that the Senate ought to represent the interests of property. ' The rights of the minority must be protected, and the rich are always fewer in number than the poor,'³ said Macdonald in his address to the delegates at Quebec, and this principle no one seems to have denied. Many members would have raised the proposed property qualification (\$4,000 in real property), but this was objected to by the Maritime delegates.⁴

Yet all these functions were purely negative. No public man of the day seems to have assumed that the Senate should take any part in forming or leading the opinion of the country, or that it should have any influence upon public policy other than as a restraint upon unwise or hasty legislation. Macdonald spoke of the Senate 'as the controlling and regulating, but not the initiating, branch (for we know that here, as in England, to the Lower House will practically belong the initiation of matters of great public interest).' To him

¹ *Conf. Deb.* 571.

² *Ibid.* 36.

³ *Pope's Documents*, 58.

⁴ 'At the Quebec Conference we were all in favour of a higher qualification, but it was reduced to suit Prince Edward Island and Newfoundland.' *Pope's Documents*, 120.

it was merely the 'House which has the sober second-thought in legislation,'¹ and nothing else. Thus the Senate was intended to be nothing but a legislative body, and even in that capacity to hold subordinate place to the House of Commons.

Summing up briefly the intentions of the fathers of federation we may say that they had in mind: (1) That the form of the Senate should satisfy the sentiments of particularism of the various sections without at the same time endangering the unity of the new Dominion. (2) That it should perform the legislative functions of revision and restraint upon the House of Commons and the Executive. (3) That it should represent conservatism and property. It was not intended that the Senate should be a powerful institution, or should have any control over a Government except by reconsidering its legislation. It was not expected that it should be the primary means of defence for the protection of the provinces or of the sections, but that it should be strong enough to protect these only in the last resort. In short, the Senate was to be in every way a secondary political institution whose ample legal powers should be called into play only when rights were endangered by hostile legislation.

¹ *Conf. Deb.* 35.

NOTE TO CHAPTER III

Clauses in the B.N.A. Act of 1867 relating to the Senate

THE SENATE

Numbers of
Senators.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two Members, who shall be styled Senators.

Representa-
tives of Pro-
vinces in
Senate.

22. In relation to the constitution of the Senate Canada shall be deemed to consist of three divisions :—

(1) Ontario ; (2) Quebec ; (3) The Maritime Provinces ; Nova Scotia and New Brunswick ; which three divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows :—Ontario by Twenty-four Senators, Quebec by Twenty-four Senators, and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.

In the case of Quebec, each of the twenty-four Senators representing that Province shall be appointed for one of the twenty-four Electoral Divisions of Lower Canada specified in Schedule A to Chapter I of the Consolidated Statutes of Canada.

Qualifications
of Senators.

23. The qualifications of a Senator shall be as follows :—

(1) He shall be of the full age of thirty years ;
(2) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United

Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick before the Union, or of the Parliament of Canada after the Union :

(3) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common soccage, or seised or possessed for his own use and benefit of lands or tenements held in franc-allevu or in rotture, within the Province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due, or payable out of or charged on or affecting the same :

(4) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities :

(5) He shall be resident in the Province for, which he is appointed :

(6) In the case of Quebec he shall have his real property qualification in the Electoral Division for which he is appointed or shall be resident in that division.

24. The Governor-General shall from time to time, in the Queen's name, by Instrument under the Great Seal of Canada, summon qualified persons to the Senate ; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a Senator.

Summons of Senator.

25. Such persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

Summons of first body of Senators.

26. If at any time, on the recommendation of the Governor-General, the Queen thinks fit to direct that three or six Members be added to the Senate, the Governor-General may by summons to three or six qualified persons (as the case may be) representing equally the three divisions of Canada, add to the Senate accordingly.

Addition of Senators in certain cases.

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Reduction of Senate to normal numbers.	27. In case of such addition being at any time made, the Governor-General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four Senators and no more.
Number of Senators.	28. The number of Senators shall not at any time exceed seventy-eight.
Tenure of place.	29. A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.
Resignation of place in Senate.	30. A Senator may by writing under his hand, addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.
Disqualification of Senators.	<p>31. The place of a Senator shall become vacant in any of the following cases :—</p> <p>(1) If for two consecutive Sessions of the Parliament he fails to give his attendance in the Senate ;</p> <p>(2) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a Foreign Power, or does an act whereby he becomes a subject or citizen, or entitled to the rights and privileges of a subject or citizen of a Foreign Power ;</p> <p>(3) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter ;</p> <p>(4) If he is attainted of treason or convicted of felony or of any infamous crime ;</p> <p>(5) If he ceases to be qualified in respect of property or residence ; provided that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the Seat of the Government of Canada, while holding an office under that Government requiring his presence there.</p>
Summons on vacancy in Senate.	32. When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor-General shall by summons to a fit and qualified person fill the vacancy.
As to qualifications, etc.	33. If any question arises respecting the qualification of a Senator or a vacancy in the

Senate, the same shall be heard and determined by the Senate.

34. The Governor-General may from time to time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead. Appointment of Speaker.

35. Until the Parliament of Canada otherwise provides, the presence of at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers. Quorum of Senate.

36. Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative. Voting in Senate.

The British North America Act, 1915

(5 & 6 George V. c. 45)

(19th May, 1915).

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1.—(1) Notwithstanding anything in the British North America Act, 1867, or in any Act amending the same, or any Order in Council or terms or conditions of union made and approved under the said Acts or in any Act of the Canadian Parliament— Alteration of constitution of Senate, 30 and 31 Vict. c. 3.

(i) The number of senators provided for under section twenty-one of the British North America Act, 1867, is increased from seventy-two to ninety-six :

(ii) The Divisions of Canada in relation to the constitution of the Senate provided for by section twenty-two of the said Act are increased from three to four, the fourth division to comprise the Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta, which four Divisions shall (subject to the pro-

visions of the said Act and of this Act) be equally represented in the Senate, as follows :—Ontario by twenty-four senators ; Quebec by twenty-four senators ; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island ; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta :

(iii) The number of persons whom by section twenty-six of the said Act the Governor-General of Canada may, upon the direction of His Majesty the King, add to the Senate is increased from three or six to four or eight, representing equally the four divisions of Canada :

(iv) In case of such addition being at any time made the Governor-General of Canada shall not summon any person to the Senate except upon a further like direction by His Majesty the King on the like recommendation to represent one of the four Divisions until such Division is represented by twenty-four senators and no more :

(v) The number of senators shall not at any time exceed one hundred and four :

(vi) The representation in the Senate to which by section one hundred and forty-seven of the British North America Act, 1867, Newfoundland would be entitled, in case of its admission to the Union, is increased from four to six members, and in case of the admission of Newfoundland into the Union, notwithstanding anything in the said Act or in this Act, the normal number of senators shall be one hundred and two, and their maximum number one hundred and ten :

49 and 50 Vict.
c. 35.

(vii) Nothing herein contained shall affect the powers of the Canadian Parliament under the British North American Act, 1886.

(2) Paragraphs (i) to (vi) inclusive of subsection (1) of this section shall not take effect

before the termination of the now existing Canadian Parliament.

2. The British North America Act, 1867, is amended by adding thereto the following section immediately after section fifty-one of the said Act :—

Constitution
of House of
Commons.

51A. Notwithstanding anything in this Act, a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.

3. This Act may be cited as the British North America Act, 1915; and the British North America Acts, 1867 to 1886, and this Act may be cited together as the British North America Acts, 1867 to 1915.

Short title.

IV

CONSTITUTIONAL AND POLITICAL LIMITS

THERE can be no doubt that the dissatisfaction with the Senate, so prevalent throughout the whole of the Dominion's history, is due in no small measure to erroneous public opinion as to the place of the Senate in the constitution. This has resulted from three causes in particular : from ignorance of the intentions of the Fathers in constructing the Senate ; from the glamour which the Senate of the United States and the House of Lords have cast over Canadians ; and from a misconception of the principles of parliamentary government.

The Fathers, as we have seen, did not intend the Senate to be an equal partner with the Commons in the control of government. True, they allowed it legally equal powers in the matter of legislation, except in the case of money bills, but by no means did they intend that it should have equal political powers. That they did not construct about it legal limits which should define its political powers was not an accident, but was consistent with the whole tenor of the new constitution. The British North America Act of 1867 aimed primarily to divide the whole field of government between the federal and the provincial legislatures ; it did not seek to change the frame of government which had already been developed in each of the colonies. It simply transferred to the federal field the provincial form of government. The Senate of Canada was but the political heir of the nominated

legislative councils of the various provinces. Not one of these had been a co-equal partner with the elected assembly ; not one had made or unmade Ministries ; not one but was simply a secondary legislative chamber. In all the provinces the Executive was responsible only to the lower house. The traditions of parliamentary government were already too well-grounded in British North America for any nominated upper chamber to usurp the function of controlling the Executive. It was quite unnecessary to write this principle into a statute ; the Fathers understood thoroughly that parliamentary government required responsibility to the elected representatives of the people, and to none other.

But the Canadian Senate has been belittled because it has neither the political power of the American Senate nor the trappings and social prestige of the House of Lords. People have not stopped to consider that it is quite different from both. The Senate of the United States has powers peculiarly its own, while the Senate of Canada has not. The American Senate is by the Constitution a partner with the Executive in the distribution of patronage and in the conduct of foreign relations. Though it may not be the first to open the public purse, in practice it spends the people's money with as much prodigality as the lower house. Under the American form of government, where there is no effective control either of legislation or of finance by the Executive, the legislative functions of the upper house are as unlimited as those of the lower. Because the American Senate is a much smaller body than the House of Representatives, and because its members enjoy longer terms of office, it is the more effective legislative body. The American system of 'government by compartments' requires that definite duties be assigned to each arm of government. In the original distribution the Senate fared sumptuously ; its inheritance no other organ of government can legally take away. The Canadian Senate, on the other hand,

was granted no special powers, no means by which it could wrest the control of policy or of government from its rival, the House of Commons, and no special duties which the general public must look to it alone to perform. It is not without significance that the most powerful second chamber in existence to-day is found not under a parliamentary but under a presidential form of government. The reason is plainly this—a presidential form of government depends upon a distribution or 'balance' of powers between the several arms of government, each sufficiently powerful to protect itself, and each responsible for checking the other. A parliamentary form of government, on the contrary, seems to work best under a concentration of powers and of responsibility in the Cabinet at the expense of both houses of the legislature. This principle many hostile critics of the Canadian Senate have failed to consider.

Nor can the Senate be fairly compared with the House of Lords. True, the Fathers obviously modelled it on the Lords as well as on their own second chambers. But unlike the Lords it does not represent a particular class. Historically, the Lords is an estate of the realm; the Senate is nothing but a second chamber. Incidentally, the House of Lords fulfils the functions of a second chamber, but the traditions, the dignity of an ancient estate which once ruled the nation still lend to it a certain prestige. Such a condition could not apply to a new country like Canada which has no ancient nobility. Moreover, the Lords as a class are imbued with age-long traditions of public service. In every Cabinet there are peers. For ambitious young peers careers are still open as ambassadors abroad, as colonial governors, and in the army and navy. In addition, the system of under-secretaries used so generally in the British Parliament allows a Prime Minister to make use of the best talents of his party in either house. Consequently, the House of Lords always numbers among its members many who have served the State

in various public capacities, with the result that probably no other second chamber in existence to-day includes among its members so many distinguished and experienced public servants. Although the House of Lords has lost much of its power as an upper chamber, many of its members are still important figures in the politics of the Empire, both at home and abroad. This condition, again, could hardly apply to a new country like Canada, where there is no traditional governing class and no leisure class to devote their whole lives to public service.

But even an appreciation of these differences is not sufficient to explain the place of the Senate in Canada's constitution. We must consider some of the principles of parliamentary government as it is known to British peoples.

Perhaps no principle is more fundamental than that the Executive should be responsible to the people's elected representatives, and through them to the people. Since 1832 the House of Lords has never attempted to enforce cabinet responsibility to itself, even in the matter of legislation. The theory upon which the Lords have acted was well put by the Duke of Wellington :

' For many years, indeed from the year 1830 when I retired from office, I have endeavoured to manage the House of Lords upon the principle on which I conceive that the institution exists in the Constitution of the Country—that of conservatism. I have invariably objected to all violent and extreme measures . . . I have invariably supported the Government in Parliament upon important occasions, and have always exercised my personal influence to prevent the mischief of anything like a difference or division between the two Houses.'¹

In short, it is the duty of the Lords to follow not to lead, to object at times, perhaps, but not to obstruct. If the Lords have vetoed legislation it has been with the object of assuring that legislation passed by the

¹ Quoted in Marriott, *English Political Institutions*, 158.

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Commons either of their own volition or under the crack of the party whip, has been demanded by the nation ; it has not been with the intent of enforcing responsibility of the Cabinet to the upper chamber, for, although the Lords might believe that their opinions coincided with the general opinion of the nation more nearly than did the opinions of the Commons or of the Cabinet, there has always been a fatal objection to such a presumption. The Lords could never fall back upon the mechanics of the franchise and popular election to claim that they represented the nation. So it has been with the Senate, and perhaps must be with any chamber which is constituted by any other method than that of popular election. It would be the antithesis of representative government for a nominated or hereditary chamber to claim that the Executive must be responsible to itself on the assumption that it represents the people. At the most it can enforce only a sort of negative responsibility, it can only make sure that the popular chamber does actually represent the opinions of the people. It may, on occasion, go so far as to compel a dissolution of the lower house, but even then it must do so only to test the opinion of the electorate.

In a democracy a non-elective upper house cannot be the ruling partner in government. It must always be content with a secondary place. To all appearances, it may be quite as powerful as a lower house, and legally have the right of an absolute veto on legislation passed by the lower chamber and the right of obstructing completely the Executive, but the moment it lays claim to such powers its existence is imperilled. As Sidney Low pointed out in regard to the Lords, its strength lies in its weakness ; if the House of Lords should lay claim to the powers which the constitution legally allows it might not last beyond the life of a single Parliament. And, indeed, subsequent events have proved the truth of this observation. The Parliament Act of 1911 was Democracy's answer to an

unfortunate exercise on the part of the Lords of their undoubted legal powers. Yet it is extremely doubtful if this Act really limited the political powers of the Lords. It simply embodied in a statute the principle upon which the Lords had long acted but for the moment had forgotten—that they should not obstruct the clearly expressed wishes of the people.

The Senate occupies a similar place in Canada's constitution. As a nominated chamber it cannot logically claim to represent the people equally with the House of Commons. For the same reason it cannot demand that the Cabinet be responsible to it. Executive responsibility to the lower house alone is a well-established maxim of government in Canada, as well as in Great Britain. More specifically this principle settles the following points with regard to the Canadian Senate. (1) A vote of censure by the Senate on the Cabinet or on any member thereof is no reason for the resignation of the Cabinet.¹ (2) The defeat of any government bill by the Senate is also no reason for resignation. Thus, although the Senate threw out the Naval Bill of 1913, the most contentious measure in many sessions, a measure put through the Commons only by the adoption of 'closure,' the Government gave no hint of resignation.² (3) Similarly, motions against the policy of the Government,³ or (4) in support of projects not on the Government's programme⁴ are not a reason for resignation of or for

¹ See discussion on the dismissals of public officials in Prince Edward Island, *S.D.* 1874, 192 ff., and on the motion for a committee to enquire into the Pacific Railway, *S.D.* 1873, 1st Session, 187 ff. The Government refused this request on the ground that it was a vote of 'no confidence,' but undoubtedly the real reason was that it might bring out damaging evidence, not that the resolution itself would compel the Government's resignation.

² See *Canadian Annual Review*, 1913, 168 ff.

³ *E.g.* in 1874 a motion was carried in the Senate against the policy of the Government in building the Georgian Bay Railway, but the Government proceeded with the project. *S.D.* 248 ff.

⁴ *E.g.* Macpherson's motion calling attention to the increase in public expenditure, *S.D.* 1879, 257-9, also Read's motion on the Georgian Bay Railway, *ibid.* 309 ff. Answer to this motion by Campbell (the

change in policy by the Government ; they are really only gratuitous advice which the Government may take or leave at will. On the other hand, the Cabinet has always treated the Senate under the forms of responsibility. The Speech from the Throne, which is in reality but the Government's programme for the session, is addressed to both Houses. Questions as to the policy of the Government may be addressed to and answered by the Government in either House. Changes in the Ministry or other events of political importance are usually announced simultaneously in both Houses.¹ And the various governmental reports required by statute or custom to be presented to Parliament are laid on the table in both Houses.² But the responsibility of the Cabinet is only formal, and not at all real.

The strict adherence to the principle of responsibility to the House of Commons has had many other consequences for the Senate. Not the least of these has been the tendency to select few Cabinet Ministers from the Senate. Since it is necessary to keep the Commons in control at all costs a Government must be strong on the floor of that House. It is of advantage, therefore, to have as many of its Ministers as possible in the Commons to answer questions connected with the working of their departments, to put through, with as little damage as possible, departmental legislation, to handle departmental estimates, and to assist in carrying the major party measures on which the Government may expect strong opposition. It is unsatisfactory to

Leader of the Government) : ' It is quite open for this House to express its pleasure, and Ministers can bow to it as far as they can bow to it, but they cannot say that they will obey it if it differs from the conclusion arrived at in another place. The Government will say generally with the greatest possible respect to the Senate that no resolution has been passed in the other branch of the Legislature, and we must obey the decision of the House of Commons.'

¹ In 1895 the changes in the Bowell Government were announced simultaneously in both Houses. Angers, one of the Ministers who had resigned, defended his action before the Senate, just as he would have done before the Commons, had he been a member of that House. See *S.D.* 658 ff.

² Senators also receive daily reports of evidence taken by special committees of the House of Commons. See *The Globe* (Toronto), 19th May, 1925.

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private members to receive answers about any department from any other than its head, and to have this head in the Senate is likely to lead to serious criticism from members of the Commons,¹ even from government supporters, and from the press. Public sentiment, moreover, demands that Ministers of the Crown should be elected representatives of the people.² A Government with many members in the Senate, therefore, loses prestige both in the House and in the country.

In addition, only a few departments can be satisfactorily represented in the Senate, unless some system of having departments represented in both Houses is adopted. There are only a few non-spending departments; the spending departments, since the Commons control expenditure, require representation in that House for the adequate defence of departmental estimates.³ Departments which have been represented satisfactorily to the Government in the Senate are the Department of Justice,⁴ of the Secretary of

¹ See, e.g., the criticisms of the Meighen Government for having three of its members in the Senate. *C.D.* 1919, 406, 1002-11; 1921, 1169.

² Motion by Euler (Waterloo North), *C.D.* 1919, 1002 ff. 'That in the opinion of this House, all Ministers of the Crown should be members of the House of Commons, or become such within a period of three months after their appointment to the Cabinet.'

This motion received considerable sympathy from both sides of the House, but was, of course, voted down, as it implied a censure on the Ministry.

The same opinion is also shared by some members of the Senate. 'If a man wants to be a member of the Government, let him go to the people and have them return him—that is the proper course to pursue. The Government ought not to take men who have no seats in the elective chamber, and with regard to whom the people have no chance of saying whether they are suitable or not. . . . It is not in the interest of responsible government that men should be foisted upon the country. Every man who holds a portfolio in any Government should be obliged to go to the electors and get their mandamus, their permit, for him to sit and exercise the powers of office.' Senator Fowler, *S.D.* 1923, 61.

Announcement by Mr. King, the Prime Minister, on taking office: 'The allotting of portfolios to members of the Senate will not be continued as a practice, and, except for very special reasons, Ministers of the Crown holding portfolios will hereafter be selected from Members of Parliament occupying seats in the House of Commons.' *Canadian Annual Review*, 1921, 522.

³ See opinion of Sir John Abbott, Prime Minister, *S.D.* 1892, 47 ff.

⁴ Sir Alexander Campbell, 1881-5; Sir Oliver Mowat, 1896-7; Mills, 1897-1902.

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State,¹ and of Trade and Commerce.² Several other departments have also been represented from time to time, such as Militia and Defence,³ Postmaster General,⁴ Interior,⁵ Agriculture,⁶ Marine and Fisheries,⁷ Labour,⁸ and the temporary department of Soldiers' Civil Re-establishment.⁹ In addition, two Prime Ministers, Sir John Abbott and Sir Mackenzie Bowell, were members of the Senate. But the growth of the business of government has made nearly every department a spending department. This development, combined with the growth of democratic ideas about the nature of the Cabinet, and the political necessity for any Government to control and humour the Commons, has inevitably restricted cabinet representation in the Senate. The first Government formed after federation had four representatives in the Senate, but after the next election these were reduced to two.¹⁰ Since then the Government has been rarely represented in the Senate by more than two departmental Ministers, except for the purpose of filling an office temporarily. Frequently there has been only one Minister in the Senate, and he a Minister without Portfolio and, therefore, not conversant with the working of any particular department.¹¹

Against this tendency the Senate has repeatedly protested, but in vain.¹² As an alternative it has

¹ Scott, 1874-8, 1896-1908.

² Bowell, 1892-4; Cartwright, 1908-11.

³ Campbell, 1880.

⁴ Campbell, 1867-73, 1885-7; Blondin, 1917-21.

⁵ Campbell, 1873; Macpherson, 1883-5.

⁶ Chapais, 1869-73; Carling, 1891-2; Angers, 1892-6; Pelletier, 1877-8.

⁷ Mitchell, 1867-73. ⁸ Robertson, 1919-21. ⁹ Loughheed, 1919-21.

¹⁰ For the composition of the various Cabinets since Confederation see Cote, *Political Appointments in Canada*, or, *The Parliamentary Guide*.

¹¹ This was the case from 1911 to 1917 when Sir James Loughheed was Government Leader in the Senate and Minister without Portfolio. It was also the case, 1922-5, the Government Leader being Senator Dandurand, Minister without Portfolio.

¹² Complaints that the Ministry was inadequately represented in the Senate have been made against practically every Ministry since federation. See, e.g., *S.D.* 1873, 32-36; 1882, 15; 1893, 59; 1908, 108; 1923, 53.

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suggested several methods of liaison between the Cabinet and the Senate, including the system of under-secretaries used so generally in Great Britain. Two efforts to establish this system in Canada have apparently not been successful, and it is doubtful whether, even if it were adopted, the Government would be inclined to appoint senators to the new offices.¹ In 1908, on the suggestion of Sir George Ross, the Senate amended its rules to appoint six new standing committees,—Agriculture and Forestry, Immigration and Labour, Commerce and Trade Relations, Civil Service Administration, Public Health and Inspection of Foods, and Public Buildings and Grounds. It was evidently expected that the three first-named committees should handle in the Senate the business of the corresponding departments of the Government, and that, should this prove successful, committees to represent all the departments should be formed.² But the attempt was a failure. To-day the committees are merely formal : they meet rarely, and only when special business has been referred to them by the Senate. A more successful method has been recently developed. Any member of the Senate, who may be in charge of government legislation, may now ask permission of the Senate to seat beside his desk during the Committee-of-the-Whole stage any departmental official in order that the official may advise him regarding the legislation before the Committee. This rests, however, not on any rule of the Senate but merely on custom.³ This is now a common practice. Other suggestions have been : the unofficial appointment, either by the Leader of the

¹ Under-secretaries for two departments were attempted by the Thompson and Bowell Governments, 1892-96, and by the Meighen Government, 1920-21. An extended debate occurred on the subject in the Senate in 1908. (See index, 'Under-Secretaries.') See also *S.D.* 1893, 41 ; *C.D.* 1919, 974.

² *S.D.* 1908, 383 ff.

³ I am indebted for this information to Mr. A. E. Blount, Clerk of the Senate. The House of Commons has a similar custom, though it is confined to allowing only Deputy Ministers to sit by the desk of the Minister who is head of the Department, and only when departmental estimates are under discussion.

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Government or by the various Ministers, of particular senators who would represent the departments in the Senate;¹ and changing the rules of the Senate so as to allow Ministers with seats in the Commons to appear and introduce legislation in the Senate though without the right of voting.² We will consider these proposals later when discussing Senate reform.

The concentration of the Cabinet in the Commons has seriously weakened the Senate. It has greatly restricted the amount of government legislation introduced there. Naturally a Minister who has a seat in the Commons prefers himself to take charge of his departmental legislation.³ It has restricted the Senate's usefulness in amending government legislation, because of the difficulty of obtaining accurate information from a Minister who may know nothing about the working of the department which has introduced the bill. It is not at all uncommon for the Leader of the Government in the Senate to accept an amendment to a government bill only to find the Minister who has introduced it refusing to accept it in the Commons. It is a usual practice for the Government leader in the Senate to ask that clauses of bills, to which amendments have been offered, should stand over until he can consult the Minister interested. Moreover, it has reduced criticism of the Ministry by the Senate. Though quite constitutional it is thought unsportsmanlike, and at best is ineffective, to attack in the Senate a Minister who cannot appear there to answer for himself.⁴ And, finally, it has limited to a considerable extent the usefulness of the Senate in asking for information from the Government. Stereotyped answers prepared by departmental clerks and read to the Senate by a Minister who knows nothing at first

¹ *S.D.* 1922, 16.

² *Ibid.*

³ *Ibid.*

⁴ *E.g.* see the attack by Senator Bellerose upon Chapleau, *S.D.* 1883, 186 ff. Though upheld by the Senate as quite constitutional nothing happened, except possibly some fuel was added to the fire of criticism then being directed against Chapleau in the Commons and in the party press.

hand about the matter in question are far from satisfactory.¹ In the words of a distinguished senator, 'The usefulness of the Senate must be in the ratio of the Government representation on the floor of this Chamber.'² Few other developments in Canadian politics have so seriously affected the usefulness of the Senate as has the practice indulged in by every Government of limiting to a minimum the number of Ministers who are members of that body.

The most remarkable change in Canadian politics after federation was in the stability of Governments. Of the fifty-eight years of the Dominion's history, forty-three years of office have been divided between three Prime Ministers.³ Only once since federation has a Government been defeated in Parliament,⁴ and on only four occasions at the polls. On three of these the campaign centred about a single definite political issue—a new policy of high protection, provincial rights with regard to education, and reciprocity with the United States. In the fourth instance alone there was no issue of great political or economic importance before the electors, the Government being defeated on the natural wave of reaction arising out of post-war discontent and revolt among the farmers due to economic conditions.⁵ Indeed, it almost requires a political earthquake to dislodge a Canadian Government from power.

Probably the principal cause for this change was the fact that the scheme of federation gave to the various

¹ For complaints as to the difficulty of obtaining information see *e.g.* *S.D.* 1908, 324-5.

² Lougheed, *S.D.* 1908, 206.

³ Macdonald, 1867-73, 1878-91, the party remaining in power till 1896; Laurier, 1896-1911; Borden, 1911-20.

⁴ The Macdonald Government resigned in 1873 in order to avoid a vote of 'no confidence.'

⁵ The 'National Policy,' 1878; enforcement of remedial legislation on Manitoba, 1896; reciprocity, 1911. In the election of 1921 Quebec returned a solid Liberal representation, largely owing to the Government's war policy of conscription, and the West a solid Progressive block, partly due to dissatisfaction with economic conditions and partly owing to the mushroom growth of agrarian organizations.

sections the security which they required, but there are other causes no less important and perhaps less worthy. Not the least of these has been the ascendancy which the Prime Minister and his Cabinet have attained over Parliament through an enormous patronage which federation placed at their disposal. Until quite recently the civil service was recruited on frankly partisan lines; not until 1907 was the 'inside service' taken out of politics, and the 'outside service' not until 1918. Even to-day there is a vast amount of patronage at the disposal of the government of the day, and this the very 'cream' of it. The Government still appoints all senators, all judges above the rank of police magistrate, all Lieutenant-Governors of the provinces, and all the members of the various boards and commissions, which are so rapidly becoming an important feature of Canadian government. In addition, except for the brief existence of the War Purchasing Board during the War, contracts for all government supplies have been filled, as a rule, on the patronage system. Finally, there has always been a vast amount of printing to be let to the party press.¹ Another of the material foundations of office has been the time-honoured 'pork barrel'—the construction of public works to further party interests. Since the Cabinet controls the initiation of all expenditure, and no items may be added or increased by a private member even of the House of Commons, a Ministry is in a peculiarly fortunate position if it wishes to stoop to bribe the electorate, and in Canada every Government has so stooped.²

The 'pork barrel' and the patronage have had two uses. They have been used to win support at the polls for the party in power, and they have been a means of disciplining the individual members of the House of Commons. Independence on the part of a member

¹ For extent of patronage see Skelton, *Life and Letters of Sir Wilfrid Laurier*, ii. 270 ff., or Report of the Civil Service Commission, 1907.

² For examples of 'pork-barrel' methods of recent years see Grattan O'Leary, *MacLean's Magazine*, 15th February, 1924.

brings neither rewards of office for himself and his political or family connections, nor expenditure for public works in his constituency.

By these and other means the Cabinet has usurped the powers of both the Senate and the House of Commons. Indeed, the Cabinet in Canada has greater power than it has in the United Kingdom, or in any other self-governing Dominion of the Empire. An able critic described the government of Canada some years ago as follows :

‘ Canada is governed by two legislatures, one real, the other sham. The sham legislature is composed of the Governor-General, the Senate and the House of Commons. The real legislature consists of a despotic ruler—the Premier ; an Upper House—the Cabinet ; and a Lower House—the caucus of the Government members of Parliament.

The Premier is almost the absolute ruler of the country. Our politics have developed in such a way that his office combines the peculiar advantages of the Premiership as it exists in Great Britain with many of the powers of the American boss.

... The Cabinet is our real legislature. In it all the real debates take place and all decisions are arrived at. The Despot—that is, the Premier—nominates the members of this Legislature. ... The caucus of Government members forms the Lower House of our real Constitution. It is emphatically the Lower Branch, and as long as patronage remains the power it now is, will exert less rather than more influence. ...

That venerable relic, the House of Commons, checks the real Legislature to some extent by affording a means of extorting some publicity. It is a place where the Opposition may question the despot, and the actual Upper House. If the questions are too searching answers may be refused, but it is a part of the whole convention of mystification to treat the House of Commons with great respect. Moreover, it is also the custom to communicate to the House all information on public subjects, and as a channel for information to the public, a species of sublimated newspaper, it possesses considerable usefulness.’¹

¹ *The News* (Toronto), 28th November, 1905, article entitled : ‘ The Power of the Premier.’

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The supremacy of the Cabinet has revolutionized the character of Parliament. Not the least of the changes it has wrought has been the usurpation by the Government of the time at the disposal of the private member for the initiation of legislation. It has been a maxim since the beginning of cabinet government that the Cabinet is solely responsible for all administrative acts and all public expenditure. No other committee of Parliament, no private member, can be held politically responsible for either; the decline of the power of the private member to put through such legislation is the result. The following table will illustrate how complete is this control :

PRIVATE MEMBERS' BILLS (*i.e.* BILLS DEALING WITH A PUBLIC SUBJECT INTRODUCED BY A PRIVATE MEMBER INSTEAD OF BY A MINISTER OF THE CROWN) INTRODUCED IN THE COMMONS.

	1880	1890	1900	1910
Introduced - - -	36	27	39	50
Passed House of Commons -	6	2	1	4
Passed Senate - - -	4	1	0	2

IN THE SENATE.

	1885	1895	1905	1915
Introduced - - -	3	2	4	2
Passed Senate - - -	2	2	0	1
Passed House of Commons -	0	2	0	0

The control by the Cabinet of the public bill legislation has had a more pronounced effect upon the Senate than upon the Commons. In the Commons a member must sometimes be placated and his bill allowed to go through; he may represent large associations which influence many votes at the polls. This consideration does not apply with equal force to private members' bills introduced in the Senate, and the result is evident. Out of forty-five such bills introduced in the Senate from 1911 to 1919, while twenty passed the Senate, only one of them passed the Commons. It is only fair to state, however, that, as in the case of

such bills in the Commons, it sometimes happens that measures which fail as private members' bills are subsequently adopted by the Government and passed as government legislation. Private members' bills have still an educative value, but they are little likely to be passed into law immediately and usually must await the Government's pleasure. But the practical result of this virtual monopoly by the Cabinet of public bill legislation has been to limit the initiation of such bills in the Senate to those which the Government may choose to bring before it. A senator has less hope of putting through a bill of his own on a public subject than has a member of the Commons.

Another important factor which limits the power of the Senate is the fact that the Commons is necessarily the more popular house. Faith in democracy and in the elective process as the proper means of creating a legislature is almost as prevalent in Canada as in the United States. Because the Senate is a non-elective body it has been attacked as a relic of mediaevalism and a bar to progress. Aside from this doctrinaire faith in the House of Commons and distrust of the Senate there are other reasons why the Commons should monopolize the attention of the public. It is on the floor of the Commons that the part of the political drama which the public sees is played. It is there that the never-ending battle between the 'Ins' and the 'Outs' goes on. The whole romance of politics during the interval between elections centres in the Commons. The Senate, on the other hand, is but the ante-room to the political stage. In the Commons, too, all party measures are introduced; by the time these reach the Senate the public is surfeited and gladly turns to fresh matters of interest. Moreover, the purse-strings are held in the Commons, and there, accordingly, criticism of public expenditure arises. And with the purse are connected the patronage and the 'pork barrel'; the Senate dispenses none of the sweets of office. Public interest, therefore,

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in the proceedings of the Senate is notoriously lacking.¹

Finally, the protection of provincial and sectional rights, the special duty which the Senate was ostensibly designed to perform, has been provided for largely by other means. The Senate is, indeed, but one line of defence among several, the first of which is undoubtedly the courts. To the courts the British North America Act is a statute of the Imperial Parliament which created a frame of government, but which is primarily concerned with a distribution of powers. As a statute its ultimate interpretation must come from the judiciary and not from the political arm of government. It is, moreover, a statute which the Dominion Parliament has no power to amend, and which does not even receive its final interpretation from the Dominion's courts, but from the Judicial Committee of the Imperial Privy Council. However galling the subordination of Dominion courts may be to Canadians, there can be no doubt that the Privy Council has saved the provinces from a diminution of their powers.² Thus it has declared :

'When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative

¹ 'A measure or criterion that we have of the value which is placed upon speeches by members of Parliament is the synopsis which we find in the public press from day to day as to what took place in this chamber. We, in this chamber, have appropriated a very substantial sum for the purpose of disseminating to the press a synopsis of our deliberations. And what do we find? We find that the value placed upon these deliberations is indicated in about a quarter of a column in the ordinary newspaper of the day, and sometimes not that.' Sir Richard Cartwright, quoted by Porritt, page 292.

The Senate has tried various schemes, such as subsidizing a special newspaper and using a special press reporter to send reports to all the leading papers, to get its debates before the public, but without success. Many senators believe that the Senate would be more effective and more independent if the debates were not reported at all, even by Hansard.

² 'For many years after 1867 the provinces held a subordinate place as Dorion feared. Until the advent to power of the Liberal party in 1896 "provincial rights" had a small place in conservative policy, dominated as it was by the personality or memory of Macdonald. But, however much party politics may have forced issues in constitutional law . . . there was a safeguard independent of politics. . . . That safeguard is found in the fact

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assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area the local legislature is supreme, and has the same authority as the imperial parliament or the Parliament of the Dominion.'¹

Such a declaration clearly sets a limit to the invasion by the Dominion of the powers assigned to the provincial legislatures by the British North America Act.

But there are other means whereby the rights or interests of the provinces may be invaded. In the first place, they may conceivably be invaded by the exercise of the power of the Dominion Government to disallow statutes of the provincial legislatures. But this is an executive act for which, like other executive acts, the Cabinet is responsible to the House of Commons. Over it the Senate has virtually no control. Secondly, provincial interests may be affected by Dominion legislation by virtue of one of the enumerated powers of the Dominion Parliament. Against neither of these dangers have the provinces judicial protection. Yet even in respect of such legislation the Senate is not primarily responsible. The first means of protection lies rather in the federal nature of the party and of the Cabinet itself. The party in Canada is a creation with many heads. Its organization extends throughout

that the Privy Council has always considered the British North America Act as a statute, has held that its interpretation must begin from that point of view, and that all its parts must be given their natural sense when read in conjunction. As a consequence . . . we have been saved from much emotional challenge, and from the so-called invasion of sacrosanct instruments, and from any attempts to confine interpretations within a pre-conceived Canadian notion of the essence of the Canadian system. These facts are neither academic nor legal. They are of practical importance.' Kennedy, *The Constitution of Canada*, 405. See also H. A. Smith in *Yale Law Journal*, xxxiv. 3 (Jan. 1925).

¹ *Hodge v. The Queen*, 9 Appeal Cases, 117.

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every province of the Dominion. Its chiefs are the party leaders at the provincial capitals and at Ottawa.¹ The sentiment of a whole province is, therefore, little likely to be antagonized by legislation; there are too many votes at stake. Similarly the Cabinet is always a federal body. It would be almost as unconstitutional to-day for a Prime Minister to compose a Cabinet of representatives from a single province or a single section of the Dominion as it would be to remain in office after a vote of want of confidence in the Commons. Convention requires that the Maritime Provinces, Quebec, Ontario, the Prairie Provinces and British Columbia shall all be represented in the Cabinet.² Thus, the prophecy of Dunkin, that the Cabinet would necessarily be a federal body, and that to it would fall the duty of protecting the provinces, has been fulfilled, to some extent at least. The most important question in the Dominion's history, involving provincial rights, namely, the Manitoba school issue in 1892-6, led to the break-up of the Cabinet; this is good evidence that the federal Cabinet is of great value in protecting the

¹ *E.g.* in the Liberal Convention at Ottawa in 1919 the national organization of the party was constituted as follows: President, the Liberal Leader in the Dominion Parliament; Vice-Presidents, the nine Leaders in the provincial legislatures; A National Council of fifty-four, six from each of the provincial organizations, including the party Leader. *Report of the National Liberal Convention*, Ottawa, August 1919, 203.

² 'In considering the claims of the leaders of the political party at Ottawa and at the provincial capitals the new premier must also regard (1) the claims of French Canada; (2) the claims of the other eight provinces; (3) the claims of the English-speaking population of Quebec; and the claims of the Roman Catholic population of the Dominion that is not French.' Porritt, *Evolution of the Dominion of Canada*, 357.

'Now there are one or two other features which lead towards a large Cabinet in Canada, and they cannot be ignored. Population is not by any means the chief consideration . . . each section of the Dominion feels that it is entitled to representation in the cabinet. We have not gone so far as to say that every province must be represented, though that was the condition at the beginning of confederation. But we take the view that every large division of the country, the east, the west, the centre, the maritime provinces, the Pacific coast, that all these groups ought to be represented. . . . Then there is another consideration. . . . We are a people of different races in Canada, and it is deemed to be the part of wisdom, that these different races should if possible be represented, not only in parliament, but in the cabinet.' Mr. Fielding, *C.D.* 1909, 6725.

provinces.¹ Thus has the Senate been relieved of a duty which might have added to its popularity and its usefulness. But even here it has still a considerable field of activity. In the rush of legislation in the lower house the interests of the provinces may be overlooked in minor matters, or they may be purposely invaded for temporary party advantage, or their legal rights may be trespassed upon, thereby causing unnecessary litigation. In such cases as these the Senate may, and at times does, protect the provinces, but it is work not likely to attract popular attention, and may even be against the temporary opinions of the public. This is practically all of the responsibility of protecting the provinces which remains to the Senate.² We shall consider later this side of the Senate's activity.

Thus has the rôle of the Senate been circumscribed. It was not intended to be a powerful, aggressive institution, and extra-constitutional developments, unforeseen by the Fathers of the federation, have curtailed its expected influence. There still remain to it, however, important legislative duties. Yet the ascendancy of the Cabinet and the popularity of the House of Commons have determined that, even as a branch of the legislature, it must be a secondary body, subordinate to the Cabinet and to the Commons. It is in this capacity that we shall consider it.

¹ The Manitoba Legislature had abolished Separate Schools. On a test case before the Judicial Committee of the Privy Council the province was upheld, but it was suggested that the Dominion Government might compel the province to re-establish the schools. The Dominion Government, therefore, attempted to put through a bill to compel the province to re-establish the schools. As a result seven Cabinet Ministers resigned in a body; some of them, however, rejoined the Government later. See Skelton, *Life and Letters of Sir Wilfrid Laurier*, i. ch. 9.

² The idea that the Senate is needed to protect provincial rights was stressed by Sir George Ross—'The first and only duty of the Senate is to consider the treaty rights of all the Provinces under the Constitution.' Ross, *The Senate of Canada*, 51.

This is theory, however, and does not take account of the fact that provincial rights are protected by the means I have indicated above.

V

THE SENATE AT WORK

THE formal ceremonies which symbolize the relations between the King's representative, the Governor-General, and the Houses of Parliament are performed in the Senate Chamber. At the upper end of the chamber is the Throne which is occupied by the Governor-General on state occasions when he opens and prorogues Parliament or gives formal assent to bills. At such times the Commons, led by their Speaker, crowd the antechamber and the space behind the bar at the lower end of the chamber. The Speech from the Throne at both the opening and the closing of the session is read in English and in French. The part of the Speech referring to legislation and public affairs in general is addressed to both Houses, while the part referring to supplies is addressed to the Commons only. The customs which regulate the elaborate bows of the Gentleman Usher of the Black Rod to the Speakers and to the Throne, and the occasions on which the Speakers shall raise their three-cornered hats in acknowledgment of His Excellency's gracious speech are quite as binding and quite as important as they are in the British Parliament. Of all this pageantry the Senate chamber is the stage, and the Senators leading members of the cast.¹

After the delivery of the Speech the Governor-General and his staff leave the chamber, the Commons

¹ For a description of the ceremonies at the opening of Parliament see Porritt, *Evolution of the Dominion of Canada*, 280 ff.

troop back to their own House at the other end of the building, the Speaker resumes the Chair and the Senate proceeds to business. As at Westminster, both Houses in Canada turn first to their own business and read a bill the first time *pro forma* before considering the Speech, as a time-honoured assertion of their independence of the Crown. Then follows the 'Debate on the Address,' as the discussion on the Speech from the Throne is called colloquially.

In the House of Commons the Debate on the Address is one of the important events of the session.¹ Usually it lasts from two to four weeks, the business of the House being postponed until its conclusion. This debate has three important functions: (1) It provides an opportunity for the Government to explain and defend its policies in general before Parliament and, through the instrumentality of the press, before the electorate. (2) It allows both the Government and the Opposition to take the sense of the House and the country on the various proposals brought forward in the Speech. (3) It gives an opportunity to individual members, of which even the 'back-benchers' are not slow to take advantage, to voice the grievances of their constituents. In the Debate on the Address the great voting public is never forgotten. The Debate has its uses, but the honest expression of individual opinion is not one of these. It is rather extremely partisan and conducted always with a watchful eye upon the press gallery. Yet, paradoxical as it may seem, there is an air of reality about the Debate in the Commons just because it is partisan and at times demagogic. The very fact that members consistently speak to the electorate makes the Debate a barometer of public opinion which a wise Government must read carefully, and then modify its programme accordingly.²

¹ See Porritt, *ibid.* 402-5.

² In the Debate on the Address in 1923 the western members raised loud complaints of the condition of agriculture in the prairie provinces. Before the end of the session the Government brought in a bill to build several branch railway lines throughout the West, so as to give better railway

In the Senate, on the other hand, the Debate on the Address is relatively unimportant. Senators are not concerned as individuals with the next election, and attempt neither to tell the electorate what they wish to hear nor to voice their grievances. Speeches have, of course, a party complexion, but there is not the degree of bitter partisanship which often marks speeches on the Address in the Commons. Instead, there is greater intellectual honesty and a better expression of individual opinion. In short, the Debate on the Address in the Senate is more the expression of the opinions of the individual members, while in the Commons it is more the expression of the opinions of the electorate. Because of this very difference the Debate in the Senate is the more academic ; it is little more than the advice of individual members, and as such it rarely influences policy. Though in the Senate speeches on the Address are often very able, indeed quite as able as those in the Commons, they have about them an air of unreality, an atmosphere of a debating society rather than of a legislature, and the press and public ignore them almost entirely. For these reasons the Senate rarely indulges in a lengthy discussion, and it usually adjourns at the end of a week at the most, until the lower house is ready to do business.¹

The character of the Debate on the Address in the Senate is typical of many other discussions which occur there. Practically every year a number of important subjects connected with public policy or of public interest are discussed at length in the Senate. Speeches on such subjects are often valuable for the information

facilities to farmers and to create work. In the session of 1924 the Budget dropped the duty on agricultural implements. While the attitude of the western members was not the only cause of these changes it was certainly an important one.

¹ *E.g.* the Senate concluded the discussion of the Address in 1924 on March 7th, and adjourned until April 1st. These long adjournments often give rise to hostile criticism on the part of the press, criticism which usually takes the form of censure of the senators for drawing their sessional indemnities without work, and which does not take any account of the time wasted by useless discussion in the Commons,

that they contain and the individual opinions they express, often indeed of much greater value than similar debates in the House of Commons. The reasons are obvious ; members of the lower house have less leisure to obtain the necessary information and to prepare their speeches, and where party considerations enter into the question to any degree they are more likely to adopt the party view for the benefit of the press gallery and the electorate. The difference in the quality of many of these debates is well illustrated by the perennial debates on Senate reform which occur in both Houses. In the Commons the great majority of the speeches delivered on this subject have been based on theory or prejudice, and show little or no appreciation of the historical reasons for the existence of the Senate and of the work which the Senate actually does. In the Senate, on the other hand, the whole subject has been canvassed many times with a fair amount of thoroughness, and a wealth of historical and other facts has been brought to bear upon the question. In this, as in many matters, the House of Commons reflects opinion without always facing the facts of the case.¹ Many of these debates on public questions have been in advance of opinion in the House of Commons. The National Policy of protection was apparently first introduced into Parliament by a motion and debate in the Senate.² The attitude of British Columbia to the importation of Chinese coolie labour was voiced for the first time in Parliament on the floor of the Senate.³ Such changes in the procedure of Parliament as the adoption of the system of under-secretaries and of allowing Ministers to enter and speak in both Houses, which were discussed recently in the House of Commons, were discussed years ago in the Senate.⁴ Moreover, on the outbreak of the South

¹ *E.g.* cf. *S.D.* 1906, 450 ff.; *C.D.* 2276 ff.; *S.D.* 1908, 980 ff.; *C.D.* 1514 ff.

² In 1877, *S.D.* 1893, 72.

³ *S.D.* 1880, 158-68.

⁴ *S.D.* 1908, 188 ff.

African War the only discussion in the Canadian Parliament of the causes and events which led up to the struggle occurred in the Senate, both parties in the House of Commons contenting themselves with mere jingoism.¹

It is undoubtedly one of the functions of Parliament to lead and instruct public opinion. One of the means whereby this can be done is by the discussion of subjects which, for the time being, are outside the field of practical politics. For the performance of this duty the House of Commons is at present by no means adequate. It is too busy with the more practical duties of legislation and of controlling the Cabinet; and it is scarcely ever free from the trammels of the party, even in its most academic discussions. If the Ministers take part in such debates they naturally fall back upon existing conditions, lest they should commit themselves to new policies which might lead them into difficulties.² Their followers are inclined, even on so-called open questions, to follow their lead. Thus the honest expression of individual opinion is rarer in the House of Commons than in the Senate, where members, except possibly Cabinet Ministers, commit themselves and their party to nothing by frank opinions. Yet, however excellent the debates in the Senate may be at times, they are ignored by the press, and though

¹ 1899. *C.D.* 8992; *S.D.* 999. The debate in the Commons fills about eight columns of *Hansard*, that in the Senate about twenty-four. During the three years 1921-23 the following subjects were discussed: Electrification of Government Railways; The Railway Problem in Canada; The Conservation of Coal Deposits; France in the Ruhr; Freight Rates between the Maritime Provinces and the rest of Canada; Establishment of a Freight Rates Commission for the Great Lakes; Most Favoured Nation Treaties which extend to Canada.

² *E.g.* see the attitude of the Ministry in the discussion on a motion by Lemieux to allow Ministers to enter and speak in both Houses, 1921, *C.D.* 1152 ff.; and on the debate on the Resolution of Irvine (Labour) to adopt the Swiss rule of cabinet government, whereby one Minister of the Government could be censured and compelled to withdraw from the Cabinet without censuring the whole Cabinet. The general hostility from the two old-time parties to this proposal arose, undoubtedly, in part from the fact that the motion was introduced by a Labour member. Speeches from the two old-time parties were condemnatory, not judicial. See *C.D.* 1923, 208 ff.

the Senate may thus educate itself, it has little influence on the government of the day or the electorate. But the fault is not all with the press.

The discussion of public questions is, however, only a secondary duty of the Senate ; its primary duty is that of legislation. It is the right of every senator to introduce public bills without the requirement of leave of the House, as is demanded in the Commons, and also private bills, after the regulations regarding petition have been passed upon by the Committee on Standing Orders.¹ Public bills, whether introduced by a member of the Senate or brought up from the Commons, go through four and sometimes five stages : first reading, which is usually formal ; second reading, when the bill is explained and its principle debated ; the discussion in Committee of the Whole, when its details are examined and, if necessary, amended ; and the third reading, which is usually formal and at which stage amendments may be added only after notice.² If the Senate considers that special information is required or that the bill may affect private or vested rights, it may be referred after its second reading to a standing or a special committee, where witnesses may be called and evidence taken.³ This, however, is but an extra precaution and does not take the place of the discussion in Committee of the Whole. Moreover, between each of the successive stages at least a day must intervene, unless by special suspension of the rules.⁴

As regards private bills, there are certain differences in the procedure. A private bill may be introduced only after petition.⁵ The petition is passed upon first by the Committee on Standing Orders, which investi-

¹ Rules of the Senate of Canada (1923), 61, 111 ; Rules House of Commons of Canada (1918), 48. For a full discussion of the Rules of Procedure in both Houses see Bourinot, *Parliamentary Procedure and Practice*, 4th ed. 1916, chaps. xv-xvii.

² Senate Rules, 62-4.

³ For example, the ' Branch Lines ' Bills in the Session 1924 were all referred to the Railway Committee.

⁴ Senate Rules, 63.

⁵ *Ibid.* 113.

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gates whether all the regulations as to deposit of plans, publication of notice, etc., have been complied with.¹ If so, the bill is read the first and second times, in the same way as public bills, and is then referred to one of the three Standing Committees on Private Bills, where, after an interval of at least a week, hearings of interested parties are held.² The committee may pass the bill as it is, amend it, or, if the bill is objectionable, report that 'the preamble is not proved.'³ The report of the committee may be adopted by the Senate or referred back with orders to amend in a certain way.⁴ Unless by special order of the Senate private bills are not considered in Committee of the Whole⁵ as they are in the Commons,⁶ and usually the report of the private bills committee, to which they have been referred, is accepted without question. Thus, as a rule, the whole burden of private bill legislation falls upon these committees, though they act, of course, under the supervision of the Senate as a whole.

The work of legislation in the Senate itself is carried on in a leisurely but business-like manner. Discussion on legislation is conducted in conversational tones, with an eye to the matter in hand and not on the press gallery, as often happens in the Commons. Speeches are short and pithy; rarely do they extend over half an hour in length. Opinions of individual members are freely expressed, often in opposition to party policies, and cross-voting on divisions takes place to a much greater extent than in the House of Commons. Indeed, as regards the business of legislation, the House of Commons has much to learn from the Senate.

As at Westminster so at Ottawa, many of the practices of party government are followed in the upper house as well as in the lower. The membership of the Senate is divided into the Government and the Opposition. Both parties have recognized leaders; the Leader

¹ Senate Rules, 111.

³ *Ibid.* 124-6.

⁵ Senate Rules, 128.

² *Ibid.* 117, 119, 122.

⁴ Bourinot, *Parl. Procedure*, 479.

⁶ Commons Rules, 108.

of the Government, since he is a member of the Cabinet, is appointed by the Prime Minister, while the Leader of the Opposition is elected by a caucus of the Opposition senators. The Government supporters sit to the right of the Speaker, the Opposition to the left, the party leaders occupying opposite desks in the front rows of their respective sides of the House, just as party leaders do in the Commons. On a change of Government the parties change sides in the Senate as in the Commons. But party organization is much looser in the Senate than in the lower house. While there are now whips their functions are largely ornamental. Nor is there a real party caucus, though senators of either party meet together informally at times to discuss particular measures. Senators, however, are encouraged to attend the regular parliamentary caucus of all the party members of both Houses. Some, believing that this infringes on their independence, do not attend, while those who do rarely take a leading part in the discussions. By attendance and acquiescence in policies adopted in the caucus a senator places himself under obligation to adopt the orthodox party views on subjects discussed there, just as does a member of the Commons. But since a senator's seat is assured in any event, there are fewer means of discipline to compel either attendance or the adoption of party policies than there are over a member of the Commons. Consequently, party organization and discipline is much less effective than it is in the House of Commons.¹

While the Senate is in session as a House it is presided over by the Speaker, but when it sits as a Committee of the Whole by one of the senators as chairman. Following the precedents of the House of Lords and of the nominated councils in the provinces prior to federation, the British North America Act provides that the Speaker of the Senate shall be appointed by the

¹ I am indebted for the information in this paragraph to Sir James Loughheed, Conservative Leader in the Senate; to the Hon. Raoul Dandurand, the Leader of the Government; to the Hon. Hewitt Bostock, the Speaker, and to the Hon. Thomas Chapais.

Crown.¹ The Speaker of the Commons, on the other hand, is theoretically elected by the House. In practice both Speakers are appointed by the Prime Minister; and both offices are patronage reserved for eminent party supporters. But in both Houses, despite the partisan nature of the appointments, tradition requires that the duties connected with the office shall be performed in a non-partisan manner.² Unlike the Speaker of the Commons, the Speaker of the Senate is, however, an active supporter of the party when he is out of the Chair. He may still attend the party caucus; he has a vote on every question like any other member of the Senate; he uses his personal influence in support of party measures;³ and, on occasion, he descends from the Chair and takes part in the debate.⁴ One Speaker, indeed, was actually at the same time a member of the Cabinet.⁵ But while the Speaker is in the Chair he assumes a correct judicial attitude. The differences between the two Speakerships are of historic origin; both offices are modelled on those of the British Parliament. The Lord Chancellor, a member of the Cabinet, presides over the Lords, where he represents the Crown, rather than the dignity and authority of the House of Lords. He is not addressed by members when they rise to speak; instead, remarks are addressed to members of the House. Nor can he call members to order without an appeal for his ruling from the floor of the House.⁶ These customs are followed meticulously at Ottawa. Thus, the Speaker of the Senate is in reality but a chairman or presiding

¹ Sec. 34, B.N.A. Act, 1867.

² See Porritt, *Evolution of the Dominion*, 378, 280.

³ See Sir Joseph Pope, in *Canada and Its Provinces*, vol. 1, 282.

⁴ E.g. Mr. Speaker Power, *S.D.* 1906, 178.

⁵ Mr. Speaker Macpherson, 1880 to 1883.

⁶ 'In such matters' (*i.e.* breaches of order), 'however, the speaker of the senate has no more authority than any other senator, and, in that respect, occupies a position very different from that of the speaker of the commons, whose duty it is to stop a member the moment he is guilty of a breach of order, and to enforce the rules and the usage of the house with promptitude and decision.' Bourinot, *Parl. Procedure*, 360.

officer, the first among equals, rather than an official who represents the House and who sits above the party strife as the Speaker does in the Commons.

So far we have considered only the external organization of the Senate; its internal organization, consisting of committees, is no less important. Committees are of two kinds, Standing and Special. Standing Committees are required by the rules, and are appointed at the opening of the session; Special Committees are appointed from time to time throughout the session for particular purposes. The Standing Committees are nominated in the early days of the session by the Committee of Selection, or 'striking committee';¹ Special Committees are usually nominated on the motion of the member who has introduced the subject with which the committee is to be called upon to deal.² The Committee of Selection is nominated on the floor of the Senate by a motion from the Leader of the Government. It is composed of nine members, among whom are the leaders of both parties and representatives from each of the four sections of the Dominion.³ The nominations to the Standing Committees are made with a view to giving each of the provinces, or at least each of the four sections, a proportional representation as far as possible on each committee,⁴ and with regard to the special fitness or interest of the members. Members are usually continued indefinitely on the same committees. Chairmen are elected by the committees themselves⁵ on the nomination of one of the committee members. The Standing Committees and their membership are as follows: ⁶

Committees on the Internal Business of the Senate or of Parliament:

Joint (with the Commons Committee) on the Library	17
Joint (with the Commons Committee) on Printing of	
Parliament	21

¹ Senate Rules, 77.

² *Ibid.* 83.

³ See *S.J.* any year for list of Committees.

⁴ *S.D.* 1908, 39-45.

⁵ Senate Rules, 79.

⁶ Senate Rules, 78 (1923).

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On the Restaurant (the Speaker and Six Senators)	-	7
Internal Economy	- - - - -	25
Debates and Reporting	- - - - -	9

Committees on Private Bills :

Railways, Telegraphs and Harbours	- - - - -	50
Banking and Commerce	- - - - -	32
Miscellaneous Private Bills	- - - - -	25
Standing Orders	- - - - -	9
Divorce	- - - - -	9

Committees on Public Affairs :

Finance	- - - - -	17
Agriculture and Forestry	- - -	} 5 to 9 each.
Immigration and Labour	- - -	
Commerce and Trade Relations of Canada	- - -	
Civil Service Administration	- - -	
Public Health and Inspection of Foods	- - -	
Public Buildings and Grounds	- - -	

The three private bills committees are very efficient bodies.¹ These are the committees on Railways, on Banking, and on Miscellaneous Private Bills, and as we have noted before, they carry out practically all the work of private bill legislation in the Senate. They are much smaller than the corresponding committees in the Commons.² They contain a greater proportion of experienced legislators who in many cases have sat on the same committee for several sessions, perhaps during the life of several Parliaments. Moreover, because the Senate is a smaller body than the House of Commons, and because its membership is more continuous, committees are selected with much greater knowledge of the aptitudes and interests of individual members. Selection in the House of Commons, particularly after a new election, is largely a matter of guess-work as regards the capabilities of the rank and file. The smaller committees in the Senate and the greater leisure enjoyed by the members of the upper house tend to stimulate the interest and sense of

¹ I have not discussed the committees on the internal business of the Senate, because they are really outside the scope of this study.

² The size of the three corresponding committees in the Commons in 1922 was : Railways, 129 ; Banking and Commerce, 83 ; Private Bills, 64.

responsibility of committee members. Attendance is, therefore, more consistent, while a higher average is maintained than in the corresponding committees in the Commons.¹ And, finally, these committees work at leisure and not under high tension as often do the Commons committees, because of the pressure of other work which falls upon committee members there. Indeed, the private bills committees of the Senate are, without doubt, the most efficient department of the legislative mill in either House.

Technically, the Committee on Divorce is also one of the committees on private bills, but it deserves special consideration. By the British North America Act the Parliament of Canada was given exclusive power to legislate upon matters of marriage and divorce, except concerning the solemnization of marriage. Subsequent judicial decisions have established the right of the courts in at least six of the provinces also to exercise jurisdiction over divorce. Parliament's duties of legislation are largely restricted, therefore, to the remaining three provinces, Ontario, Quebec, and possibly Prince Edward Island.² While the jurisdiction of Parliament extends in law to the whole of Canada, in practice it has been almost entirely confined to cases from those provinces where there is no judicial relief.³ This right to legislate might, of course, be interpreted as a right to set up divorce courts or to confer authority upon existing courts to take jurisdiction, but so far the hostility of the Roman Catholic Church to divorce in general has prevented Parliament from doing this on the ground that it might

¹ The attendance at two of these committees in the Commons, 1922, was : Railways, average 34.3, or 27 per cent.; Banking, average 18.6, or 27.4 per cent. I am informed by Mr. Hinds, Chief Clerk of the Senate Committees, that the attendance at these committees in the Senate is at least 50 per cent. Some senators, particularly those who have important interests outside of Parliament, scarcely attend committees at all ; thus the burden of the work falls upon regular attendants. In the Commons committees practically the only regular attendant is the chairman, other members attending when they are interested in particular bills or have no other parliamentary duties to perform.

² Evans, R. R., *The Law and Practice Relating to Divorce and Other Matrimonial Causes*, 338-42.

³ *Ibid.* 343.

make the granting of divorce an easier matter. Consequently, legislation has been restricted to passing a special Act for each divorce granted. Since Confederation the practice has been to initiate all divorce bills in the Senate;¹ thus practically the whole burden of hearing divorce cases, in reality a judicial and not a legislative duty, has fallen upon the Senate. The Senate in turn, as in matters of private bills, has delegated the work to a standing committee, the Committee on Divorce.

Until 1888 the procedure of this committee differed little from that of any other private bills committee, but in that year a report of a committee under the chairmanship of Senator Gowan, a distinguished former member of the Bench, recommended that procedure be revised so as to correspond with the procedure of the higher courts with regard to the issuance of writs and the trial of actions.² Since then the Senate committee has been, to all intents and purposes, a court rather than a legislative committee. Though legally Parliament may grant divorce on any grounds whatever, the Committee on Divorce has endeavoured to restrict the granting of divorce as far as possible to the grounds explicitly recognized by the courts of the United Kingdom. It does not, however, consider itself bound by decisions of the English courts, and indeed actually preceded them in recognizing the right of the wife to relief.³ Hearings are always conducted in private; evidence is printed for the use of members of the Senate and the House of Commons, but it is a criminal offence to publish it in the press. Thus, the public and the parties to the causes are spared much of the disgusting publicity usually connected with divorce trials in the courts. The decisions of the committee are usually accepted without challenge by the Senate,

¹ This followed the practice of the British Parliament in leaving divorce and other judicial matters to the Lords.

² For procedure see Evans, 347 ff., or Bourinot, *Parliamentary Procedure*, 628 ff.

³ In cases of adultery without concomitant wrongs. Evans, 345.

though, on occasion, they may be overruled in the case of an ordinary private bill. Similarly the House of Commons, while reserving the right to amend or reject, rarely interferes.¹

The selection of the Committee on Divorce is an important matter and is carefully performed. The chairmanship always goes to an outstanding member of the legal profession, and usually one with an intimate knowledge of the criminal law. French-Canadian members are rarely appointed because of the hostility of the Roman Catholic Church to divorce, and because there are few cases from Quebec.² Nor, as a rule, do French-Canadian members vote on divorce bills.³ The majority of the committee are usually lawyers, and always Protestants. The committee, indeed, constitutes a highly trained jury, the individual members of which are quite as able to sift evidence as the average judge, and far more able than any lay jurymen.

Within the last few years dissatisfaction with the Senate as a divorce court has become very general. This is due largely to the rapid increase in divorce since the War. Whereas from Confederation to the end of 1919 only 396 divorces had been granted by Parliament, in the four following sessions some 423 were granted. The uninformed public naturally assumes that the Senate is becoming lax; it has not stopped to consider that the same phenomenon has appeared in almost every other country engaged in the War, and that the causes are social and have nothing to do with the

¹ For H. of C. Procedure see Bourinot, *ibid.* 642. Several divorce bills were amended in the Commons in 1924. The Senate Committee had dropped an anomalous clause which had allowed the petitioner to remarry, but had been silent as to the respondent. The silence of the clause, however, had never been held to prevent the respondent marrying again. The Senate Committee dropped the clause as useless. The Commons Committee, however, thinking that the Senate was becoming too lax, re-inserted the clause, and the Senate, for the sake of peace, accepted the amendment. See *S.D.* 1924, 367.

² In 1920 there were 100 cases before the Senate, 92 from Ontario, 8 from Quebec. In 1921 there were 135 cases before the Senate, 126 from Ontario, 9 from Quebec. *S.D.* 1921, 642. See also *S.D.* 19th June, 1925.

³ Senator Beique, *S.D.* 1920, 170. See also Bourinot, 629.

machinery or the personnel of the Senate. Another cause of this false impression has been the absence of any statute law regulating the granting of divorce, which has laid the Senate open to the charge of granting divorce arbitrarily and not by established legal rules and forms; this criticism has been fostered also by the privacy of divorce proceedings. But such censure is without foundation and is bred of ignorance and prejudice. Divorce proceedings in the Senate are probably as fairly conducted as they would be before any judicial court.¹

The granting of divorce by Parliament is an anomaly and a duty from which the Senate itself would gladly be released.² Bills have been introduced at various times into both Houses to transfer this duty to the courts. The hostility of the Roman Catholic Church and of other religious bodies to anything which might make divorce easier to obtain has so far prevented this.³ At present there seems to be no solution of the difficulty, and the hearing of divorce cases will probably continue to be, as at present, the unpopular duty of the unpopular Senate.

In contrast to the private bills committees, the committees on public affairs are now relatively inactive. These committees, with the exception of the Committee on Finance, were first appointed in 1908 on the motion of Sir George Ross. His aim was to obtain first-hand information for the Senate in their respective fields, that they might thereby stimulate legislative activity, and that they might be something of a check

¹ 'In practice, however, it' (*i.e.* Parliament) 'has always been guided by and has acted upon those well-established principles which have governed and now govern matrimonial causes in England.' Evans, 344.

² See the discussion on the bills introduced by Senator Ross, 1920, *S.D.* 165 ff. and on conditions of Divorce Bill, *S.D.* 16th June, 1925.

³ It must not be assumed that the French-speaking members of the Senate block such legislation. In the vote on the bills introduced into the Senate, 1920, only two French members voted against them; the others did not vote. The Bills carried 37-7. *S.D.* 182. Cf. Hall, 'Divorce in Canada,' *Annals of the American Academy of Political Science*, vol. cvii. (May 1923), 275 ff.

upon the various departments of government with which they should deal.¹ The last purpose has not been fulfilled; on the other hand, while the committees are now largely formal, they have performed some valuable investigations and have suggested some much-needed legislation. Occasionally, too, public bills which required special investigations have been referred to them. The seventh, the Committee on Finance, was first appointed in 1919² with the intention that it should fulfil for the Senate the duties performed by the Committee on Public Accounts in the Commons. To it, as to the Commons committee, is referred each year the Auditor-General's report. If this Committee follow in the footsteps of its prototype in the Commons, which is pre-eminently a scandal-hunting body, it may tend to give the Senate some degree of influence over the conduct of the Ministry, but so far it has produced no practical results.

The most active of these committees has been the Committee on Public Health. Under the chairmanship of Senator DeVeber several very important investigations have been conducted and reports published, among them being: The Pollution of Navigable Waters by Sewage, Garbage, etc., from Towns and Cities;³ Impurities in Milk offered for Sale;⁴ Sanitation in Logging and Construction Camps;⁵ The Anti-Toxin Treatment of Typhoid Fever;⁶ Whole Wheat Bread;⁷ and The Gluten Content of Various Foods.⁸ These reports were for the most part of educational value, and copies were sent throughout the Dominion to various Boards of Health. Two, however, that on the pollution of navigable waters, and that on whole wheat bread, led to legislation.⁹ For several

¹ The new committees were evidently suggested by the committee system of Congress to which Sir George referred in laudatory terms. *S.D.* 1908, 388-98.

² *S.D.* 1919, 473.

³ *S.J.* 1909-10, 179.

⁴ *Ibid.* 178.

⁵ *S.J.* 1910-11, 267.

⁶ *S.J.* 1914, 347.

⁷ *S.J.* 1917, 307.

⁸ *S.J.* 1919, 202.

⁹ Protection of Navigable Waters Act (Belcourt) passed Senate, 1912, 1913, 1914, 1915, 1919.

years a bill passed the Senate session after session to prevent the pollution of waters under federal control; eventually it was adopted in part by the Government. The report on whole wheat bread recommended that legislation be passed requiring the use of whole wheat bread for the duration of the War. The Government acted upon it and empowered the Food Controller to put it into effect.¹

Other committees, while less active, have also done some valuable work. The Committee on the Civil Service, in 1909-10, conducted an elaborate investigation into systems of superannuation for civil servants in force in various countries and reported a model bill which, however, was dropped because it involved the expenditure of public money, and could not legally be initiated in the Senate.² The Committee on Agriculture and Forestry investigated and reported during the War on the manufacture of commercial fertilizers, the use of power ploughs, and the importation of pedigreed live stock.³ But these committees are far less active and useful than they might be. This is partly due, however, to the fact that it has been the custom of late years to refer subjects or bills naturally falling within their fields to special committees which, because they are chosen for specific purposes, can be selected with greater care. These standing committees are now little more than 'window dressing.'

In addition to the standing committees there have been many special committees appointed in the Senate, either for the purpose of examining particular bills or for investigation. During the last decade the practice of referring public bills to standing or special committees has become very general. This is particularly the case with bills which involve changes in the criminal law, or the relations of labour and capital, or indeed with any bills which require more evidence than can

¹ I am indebted for this information to Mr. Hinds, Chief Clerk of the Senate Committees.

² S.J. 1909-10, 415-20.

³ S.J. 1917, 233.

be furnished readily by the Cabinet Ministers who are members of the Senate.¹ During the three years 1921-3 nine bills were referred to special committees.² These committees hold hearings as do the private bills committees, and report their evidence to the Senate. Unlike private bills, however, these bills are reconsidered by the Senate in Committee of the Whole. The reference to a special committee is but an extra stage for bills the necessity for which is doubtful.

Special committees appointed for investigation have also been numerous during the last decade. During the seven years 1917 to 1923 some twenty of these committees were appointed and brought in valuable reports. A few of these are particularly worth consideration. As a result of a private bill coming before the Railway Committee of the Senate in 1919 after passing the Commons successfully, irregularities in the leasing of an enormous coal area in northern Alberta were discovered.³ A special committee appointed to investigate the circumstances reported that the lease had been obtained through the leakage of information in one of the government departments, and recommended that in the future no leases be granted without the consent of Parliament in every case.⁴ As a result the Government brought in a bill in 1923 embodying the Senate's recommendations.⁵ Moreover, in the same year a special committee was appointed in both Houses to investigate the coal supply of Canada: both

¹ 'The tendency of modern practice is to refer to committees all matters requiring the taking of evidence and laborious investigation. In this way the houses are able to simplify their proceedings and make greater progress with public business.'

² 'The value of committees for these purposes has always been recognized by the Canadian Legislatures, and of late years their usefulness has received extension by the reference of many public bills of an important character to such committees.' Bourinot, *Parl. Procedure*, 454.

³ In the session of 1924 all the Canadian National Branch Lines Bills were referred to the Railway Committee.

⁴ The 'Hoppe Lease,' *S.D.* 1919, 711, 750, 787, 816.

⁵ *S.F.* 1919, 390-2.

⁶ Coal Leases Bill, *S.D.* 1923, 162.

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brought in important reports.¹ A committee appointed in 1918 on the Machinery of Government brought in, during the following year, an admirable report which forms the only up-to-date account of the organization of the Cabinet and its relations with the various government departments and boards.² Another committee, appointed 1921, has published a valuable report on the routing of Canadian exports via American ports.³ A further report of importance is that on the Civil Service brought in during the session of 1924.⁴ Different special committees have also conducted important investigations into the mineral resources of Canada, particularly oil and iron.⁵

There are also many earlier committees which require notice. Among them are the Committee on Rupert's Land, 1870, whose report was for years an authoritative document on the North-West Territories;⁶ the Schultz Committees on the North-West Territories, appointed in 1887 and 1888;⁷ and that on the Mutual Reserve Fund Life Association.⁸ The last-mentioned had far-reaching results. The investigation of the company in question, an American company, produced evidence which was later said to have been the immediate cause for the investigation into the condition of insurance companies in the State of New York instigated by Governor Hughes, an investigation which found an echo in Canada by the appointment of a Royal Commission on the general subject of insurance.⁹

As a rule, the committee work of the Senate, whether in legislation or in investigation, is well done. Instances

¹ S.J. 1923; C.J. 1923.

² S.J. 1919, 340.

³ S.J. 1922.

⁴ S.J. 1924, 494.

⁵ E.g. see S.J. Appendix, 1909-10; also S.J. 1923.

A special committee in 1925 recommended the operation of the National Railways by the C.P.R. This report, which caused violent discussion throughout Canada, came too late to be considered in the text. See S.J. 1925.

⁶ S.J. Appendix, 1870; see also S.D. 1886, 387.

⁷ S.J. Appendix, 1887, 1888.

⁸ S.J. Appendix, 1904.

⁹ Holland, *The Canadian Magazine*, 1911 (vol. xxxvii).

of committees appointed for partisan ends are rare,¹ and usually committees have worked solely with an eye to the public service. The increasing activity of the Senate as an investigating body is leading it into new fields of usefulness. It is becoming a more active force in the initiation of important legislation than it was formerly. It is attaining a greater share in formulating public policy. Finally, it is furnishing useful evidence for the education and development of public opinion. The principal reasons for increase in investigating activity would appear to be the renewed interest in public questions and public service which the War undoubtedly engendered, and to the presence in the Senate during recent years of several forceful personalities.

There is a vast field for investigation by Parliament into the economic, social and political problems of the national life. For much of this investigation the House of Commons is quite unsuited. It has neither the time nor the inclination to spend itself in the study of questions which are not of immediate practical importance and are not demanded by the electorate.

¹ Committees appointed for obviously partisan ends were : The Committee on the Kaministiquia River, the Committee on Steel Rails, the Committee on Fort Frances Locks.

These three were appointed during the Mackenzie administration to investigate the activities of the Government in constructing the Pacific Railway. The Government (Liberal) had a large majority in the House of Commons and the Conservative Party could do little to hinder its railway policy. The Conservatives were in the majority in the Senate and they compelled the Government to accept these committees, on which the Conservatives were in the majority.

The Committee on the Drummond County Railway, 1898, and that on an Overland Route to the Yukon, 1898, were apparently appointed to prove the Senate was right in throwing out certain Government bills.

The Committee on the Movement of Population, 1912, was perhaps appointed with a view to discrediting the Government's tariff policy.

With these might be mentioned the action of the Railway Committee in 1891 in its investigation of the Baie de Chaleurs Railway Bill. Its investigations showed gross misappropriation of public money by the Quebec Government, which led to its downfall. The Quebec Government was Liberal : the Government at Ottawa, Conservative, was being hard pressed at the time by charges of scandals from the Liberal Opposition and welcomed the opportunity to blacken the records of the Opposition's political friends. See Skelton, *Life of Laurier*, i. 435 ; Cartwright, *Reminiscences*, 308 ; *S.D.* 1891, under index, 'Baie de Chaleurs Railway.'

Such investigations do not win votes at the polls or notice from the press. For such work the Senate is admirably fitted : it enjoys comparative leisure ; it is free from the necessity of pleasing either the public or the press ; and, since it has no responsibility for public policy, it is not retarded by the fear that it must assume responsibility for translating into policy the results of its researches.¹ To some extent, however, its practical usefulness as an investigating body is seriously limited because the press refuses to give it publicity. This, as is the case with its debates, is due largely to the fact that the public distrusts the motives and discredits the personnel and work of the Senate. The utility of the Senate as an investigating body and in the discussion of questions of public interest depends, therefore, to a large extent upon two factors, the degree of public confidence which it enjoys and the quality of its personnel.

¹ An example of the utility of the Senate in this connection occurred during the session of 1925, when it appointed a special committee to investigate the problem of the Canadian National Railways. Public ownership and operation of the railways owned by the Dominion were so popular alike in the House of Commons and in the country at large that no public man of note dependent on the electorate for his office ventured to criticise the policy, whatever his private views upon the matter. The Senate conducted an investigation behind closed doors and heard testimony from Sir Henry Thornton, chief executive of the National Railways, Mr. Beatty, President of the Canadian Pacific Railway, and leading bankers and business men of the Dominion. No testimony was published. Under such circumstances, it is evident, there was much greater freedom of discussion. As a result, alternative plans of operation were suggested in the committee's report, and the operation of the National Railways by the C.P.R. management was recommended. The report was generally condemned by a large section of the press and the House of Commons, and the Senate was accused of endeavouring to injure the National Railways. Yet the report inevitably produced public discussion, if for no other reason than to refute the report. The public and the press were educated despite themselves. No such investigation or report would have been possible in the House of Commons at the time.

VI

LEGISLATION IN THE SENATE

THE legislative work of Parliament may, for convenient treatment, be classified as initiating, amending, and rejecting bills. I shall discuss the work of the Senate from these three angles.

The Initiation or Introduction of Legislation.

The initiation of legislation, in the proper sense of the term, is now a comparatively unimportant part of the work of either House. The days when Parliament reduced its grievances to bills and submitted them in completed form to the Crown have all but passed away. Nowadays, while bills are occasionally evolved in a committee of either House, the vast majority are brought down ready-made by Ministers.¹ With regard to such legislation, both Houses of Parliament are merely courts of revision, secondary legislative chambers whose duties are to criticise and amend, to pass or reject. While, as a rule, neither House of Parliament does, strictly speaking, initiate legislation, it makes a great difference where

¹ This is very similar to the situation in the British Parliament, though not quite so far advanced. 'As regards legislation. Though the rights of the House of Lords are in constitutional theory co-ordinate with the Commons, they are in fact inferior. During the last twenty years the Lords have almost entirely ceased to exercise their undoubted right of initiation. But this right has been usurped, not so much by the Commons as by the Cabinet. With every session the chance of passing into law a Bill promoted by a private member, whether it be introduced in the Lower or the Upper House, sensibly diminishes. The initiative in legislation has, in truth, passed to the Executive; criticism, amendment and revision are the sole functions left to the nominal Legislature.' Marriot, *English Political Institutions*, p. 162.

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bills are introduced. The primary process of revision produces the most noticeable results ; there the contentious clauses are first discussed and possibly amended, and the bulk of the legislative chaff is blown from the wheat. The introduction of by far the most legislation into the House of Commons, has, therefore, made it the more active and effective of the two courts of revision.

Although there are no constitutional restrictions upon the initiation of legislation in the Senate, except in the case of money bills which must first be introduced in the House of Commons, the Senate has never enjoyed equal privileges with the House of Commons as a first court of revision. The following diagram will indicate that since federation the overwhelming majority of government and private bills have been introduced in the lower house.

Percentage of Legislation before the Senate introduced there.¹
(By Decades.)

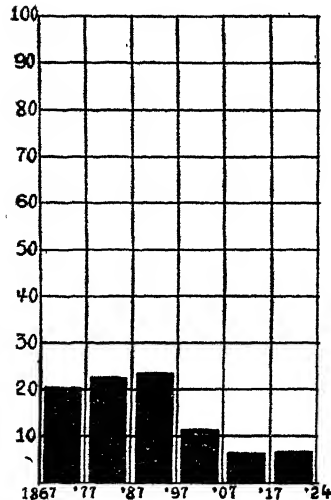


FIG. 1.
Government Bills.

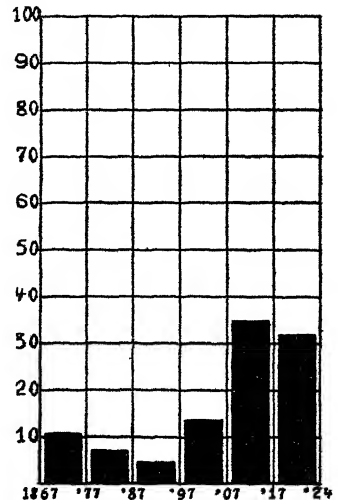


FIG. 2.
Private Bills.

¹ See Appendix C, Table I., for total legislation in the Senate, 1867 to 1924.

The above diagram, however, does not tell the whole story. Every session a considerable number of government bills which prove to be unpopular or relatively unimportant are dropped by the Government, while the slaughter of private members' bills, of which there is a perennial crop, is much heavier. These bills have not been included because they do not reach the Senate. As for private members' bills in the Senate, about 190 were introduced from federation to 1924, and of these probably twenty became law. These also have not been considered in the above diagram.

Two interesting tendencies may be observed in the diagram. In the first place, the initiation of government bills in the Senate has dropped to a comparatively unimportant figure during the last three decades. This is due not to any decline in the ability or activity of the members of the Senate, or to any lowering of the quality of its membership, but to the fact that rarely since the Laurier Government came into power in 1896 has the Cabinet been represented in the Senate by a Minister whose department required much legislation. Indeed, for thirteen of the thirty-one sessions from 1896 to 1925, the sole representative of the government of the day was a Minister without Portfolio.¹ Naturally a Minister prefers to introduce the legislation connected with his own department rather than to entrust it to a colleague who knows little about it. Moreover, since the Cabinet is responsible solely to the House of Commons, all important party measures are necessarily introduced there, as well as practically all so-called money bills.² Against the practice of every Government of introducing practically all its bills in the lower

¹ From 1918 to 1921 three Ministers, the Postmaster-General, Soldiers' Civil Re-establishment, and Labour, sat in the Senate, but their departments were represented in the Commons by Under-Secretaries or other Cabinet Ministers who were not in charge of departments, consequently much of the legislation connected with these departments was introduced as usual in the Commons.

² Money bills are sometimes introduced in the Senate with the money clauses left blank or printed in red ink, and they are technically considered to be blanks. Bourinot, *Parl. Procedure*, 493.

house the Senate has protested many times, but it is impotent to secure any change.¹

Secondly, the diagram discloses that the initiation of private bills in the Senate has increased considerably during the past two decades. The explanation, probably, is that the pressure of business in the House of Commons has driven many promoters to begin their bills in the upper chamber. At present private bills are commenced in the House where the promoter pays the fees ; thus the distribution of private bill initiation is largely a matter of chance. Time and again since federation the Senate has sought to induce the House of Commons to adopt a more satisfactory system of distribution, but without result.² As late as 1923, after years of agitation, the Senate finally secured the appointment of a joint committee of both Houses to investigate the matter. The committee brought in a report recommending that the two Speakers should meet early in the session and divide the private bills as equally as possible between the two Houses.³ The report was adopted, but as it was merely a recommendation it did not in any way change the rules of Parliament. Consequently no change has resulted. The members of the Commons find in taking charge of the introduction of private bills a means of serving their constituents and have refused to part with this privilege.⁴

There is no valid reason why more legislation should not be introduced in the Senate. Year after year the Senate grumbles because it has not enough work to do in the early days of the session, and when it adjourns for lack of work the public and the press condemn it for idleness. A better distribution of the initiation of bills would undoubtedly relieve the Commons of much of the drudgery of legislation and would tend to shorten the sessions. Many non-partisan bills could

¹ See, e.g., *S.D.* 1885, 656 ; 1906, 48.

² See, e.g. *S.J.* 1868, 260 ; *S.D.* 1874, 196-8 ; 1882, March 29 ; 1885, 705 ; 1908, 974 ; 1910-11, 209.

³ *C.D.* 1923, 4008-9.

⁴ *C.D.* 1923, 4008. *S.D.* 1924, 364.

be discussed and put into better shape by the Senate while the Commons are debating the Address and discussing the estimates. Bills which have gone through the Senate ordinarily require much less attention in the Commons. But the obstacles to the change are formidable, and no change is likely so long as the present rules of both Houses continue. Were Cabinet representation increased in the Senate, or were Ministers with seats in the Commons allowed to enter the Senate and introduce legislation there, undoubtedly there would be a greater stimulus to introducing government bills in the upper house. Nor is there any sound reason why the Speakers of the two Houses, or a joint committee, as in the British Parliament, should not regulate the introduction of private bills. Such a course would considerably relieve the members of the House of Commons of the political necessity of serving their constituents by supporting particular private bills, and would tend to take private bill legislation out of politics more than it is at present. Indeed, reform of the rules might go much further. Why should not all private bill legislation be introduced in the Senate, as divorce bills are? To any such reform there is always the serious objection—the desire of the House of Commons to play politics.

The Amendment of Legislation sent up by the House of Commons.

The most important work of the Senate has come to be that of a secondary revising chamber, the chief duty of which is to trim the legislation after it has come up from the House of Commons. Out of a total of some 2425 public bills which came up from the Commons from federation to 1924 the Senate amended about 501, or approximately 21 per cent.; of some 3128 private bills it amended some 866, or approximately 28 per cent. It has frequently been charged that the Senate has been active in amending legislation only when a majority of its members are

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opposed to the government of the day, and that at other times it is docile and entirely useless. It will be of advantage, therefore, to examine its work during the different periods of its history when its majority was in opposition or in accord with the Ministry. The following diagrams have been constructed with this object in view :

Percentage of Government Bills brought up from the House of Commons amended in the Senate.

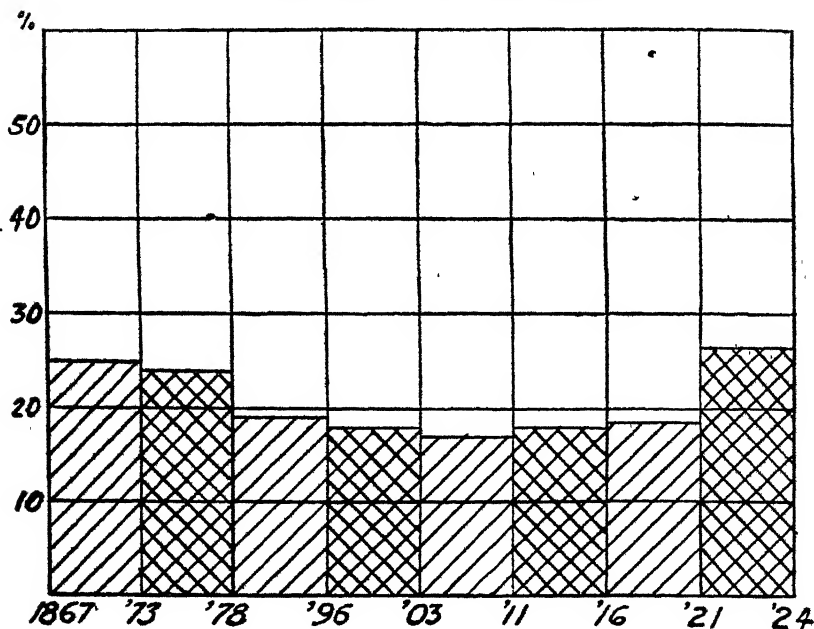


FIG. 3.

Same Party in the majority in both Houses - -



Majority of Senate of opposite Party to majority of the Commons - - - - -



Percentage of Private Bills brought up from the House of Commons amended in the Senate.



FIG. 4.

The criticism that the Senate amends legislation only from partisan motives is unjustified. The preceding diagrams show, in the first place, that in the amendment of government bills on only two occasions has the activity of the Senate increased when the majority of its members were politically opposed to the majority of the Commons, and during one of these periods the increase in amending activity was relatively unimportant. Secondly, in the amendment of private bills in no case has the activity of the Senate increased when the majorities in the two Houses were politically opposed. Thirdly, the amending activity of the Senate, particularly in the matter of government bills, has at no period been negligible, the lowest percentage in the case of government bills being over sixteen and in the case of private bills, about eleven. In the amendment of government bills the greatest variation between any two periods was less than nine per cent. The decline

in the number of bills amended, which may be observed in the second diagram, cannot be laid to negligence on the part of the Senate; but it is due rather to the fact that the forms of private bills have now become practically standardized, and promoters bring their bills to Parliament in much better shape than formerly. The activity of the Senate as a revising chamber, we may safely conclude, has been fairly consistent throughout its whole history.

There is some foundation, however, for the charge in the fact that the Senate and the House of Commons, or rather the Senate and the Ministry (since the ministerial policies on all important public matters are always those of the majority of the House of Commons), do come more often into conflict over amendments or rejections of government bills when the majorities in the two Houses represent different parties. Nevertheless, there are several incidents of conflict at other times. In 1903 the Senate made several important amendments to the Railway Acts Consolidation Bill to which the House of Commons disagreed, and two conferences were required before the questions were settled. At this time the Senate was divided almost equally between the two parties; yet the great majority of its members were opposed to the House of Commons.¹ In 1910, with a majority in the Senate of over two to one in support of the Ministry, the Senate amended an important government bill allowing the Government to lease and purchase 'feeders' for the Intercolonial Railway. These amendments were insisted on and carried in the face of the Government's majority in the Commons.² In 1919, despite the fact that the Conservative Party had a large majority in both Houses, the

¹ S.J. 1903, 476, 491, 505; Bourinot, *Parl. Procedure*, 276-80.

² The Senate's amendment was to the effect that no lease or purchase should have effect until approved by Parliament after reports had been submitted to Parliament by the Board of Management of the Intercolonial Railway and the Chief Engineer of the Department of Railways and Canals. One of the leading supporters of the Government in the Senate (McMullen) also moved to 'hoist' the bill. See Index to Bill 71, S.J. 1910-11. C.D. 1915, 2333.

Senate amended two important government bills, and conferences were required to straighten out the difficulties. In the first, the Railway Acts Consolidation Bill, the Senate insisted on its amendments and the House gave way.¹ In the other, a prohibition bill, both Houses refused to yield ground and the bill was dropped.² These instances cannot be dismissed with the simple explanation of partisanship.

Much of the legislation which passes the House of Commons is in very crude shape. Even in the case of departmental bills the drafting is often incredibly bad. As for the House it is by no means a model legislature ; it is too busy with politics, too large, and contains too many members who are unfamiliar with the technical work of legislative science. As a result much slipshod work is done there, and the burden of recasting a considerable part of the most important legislation falls upon the Senate. To the Election Law Consolidation Bill of 1900 the Senate offered eighty-seven amendments, all but a few of which were subsequently accepted by the Commons.³ To the Railway Acts Consolidation Bill of 1903 seventy amendments were added, and fifty-eight of these were immediately accepted by the Commons.⁴ The Income Tax Bill of 1917 was practically unworkable when it came before the Senate, and only by the Senate's amendments was it put into anything like satisfactory shape. Yet this was a financial measure, and one which, according to the rules of the House of Commons, the Senate had no right whatever to amend.⁵ Indeed, one might lay down as a maxim of legislation that the more complicated and technical a bill is the more it requires the revising hand

¹ *S.D.* 1919, 63, 71, 936.

² *S.D.* 1919. See Index, 'Intoxicating Liquors Bill.'

³ *S.J.* 1900, 367. Also *S.D.* Index 'Election Law Consolidation Bill.'

⁴ *S.J.* 1903, 476, 491, 505-6, 510. *S.D.* 1906, 483.

⁵ *S.D.* 1917, 761-793. *C.D.* 1917, 5883, ff. Rule 78 of the House of Commons declares the Senate has no right to amend money bills.

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of the Senate.¹ Many amendments, of course, are offered in the Senate by the Government rather than by private members.² The Senate is thus an admirable means for Ministers to supervise their own legislation and to correct inconsistencies or mistakes which have escaped their notice in the rush of work in the lower house.

The House of Commons is not a good legislative machine. The party turmoil, the harassing parliamentary and administrative duties of the Ministers, the attendance at caucuses and committees required of private members, the constant anxiety of all members to court the public and the press, all militate against good legislation. The following criticism of the session of 1924 describes admirably the condition which exists to-day in the lower house :

‘ In the early half of the session week after week was frittered away in futile discussions. . . . Time and again bills had to be sent back for re-drafting, either because their wording was unintelligible or because the acute conflict of their terms with existing statutes had escaped the notice of their sponsors. . . . But now the last week of the session finds members exhausted with ten and twelve-hour sittings and, in their anxiety to escape, ready to pass without proper scrutiny

¹ ‘ This Bill should not pass from the committee without a word being said as to the proceedings in this House upon it. We have already made eight or nine amendments in this Bill—a Bill which peculiarly affects the other House, and which we had every reason to believe would come to us in such a form that, except in some vital matter, we should not require to make any amendments at all.’ Senator Dickey on Franchise Bill, 1890, *S.D.* 712.

² ‘ It is no new doctrine on the part of the Government, and no new departure to withdraw of their own motion a clause of a Bill or to assent to an amendment which has the effect of striking out a clause or amending a Government Bill. . . . Bills of the Government, under previous Governments as under this one, have been amended by the Senate with the assent of the Government.’ Senator Beique, *S.D.* 1903, 1259.

Many incidents of the Government amending their own bills in the Senate might be cited, *e.g.* War Time Elections Act, *S.D.* 1917, 1153. This is very similar to the practice of the Lords. ‘ So far as my experience goes, the great majority of amendments made in the second chamber are accepted by the promoters of the bill, either for the purpose of removing final defects or for the purpose of conciliating opponents. With reference to such amendments it would perhaps be more accurate to say that our House of Lords is used, than that it acts, as a revising body.’ Sir C. Ilbert, *The Mechanics of Law Making*, 197-8.

millions of dollars of estimates and to send up relays of ill-drafted and ill-digested legislation to the Senate, where an enraged band of legal vigilantes, the core of that august body, fasten sternly upon it and claim to save the country endless troubles and expense by the vigorous use of their pruning-hooks.' ¹

Under such conditions a good revising chamber is a minimum requirement for decent legislation.

As regards the amendment of money bills, the right of the Senate is a mooted question. The British North America Act declares :

'Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons' (53).

But it says nothing whatever as to the powers of the Senate in amending such bills. The House of Commons, following the Commons of England, has gone farther :

'All aids and supplies granted to His Majesty by the Parliament of Canada, are the sole gift of the House of Commons, and all bills for granting such aids and supplies ought to begin with the House, as it is the undoubted right of the House to direct, limit, and appoint in all such bills, the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which are not alterable by the Senate.' ²

On the other hand, a special committee of the Senate appointed in 1917 to investigate the question took the following stand :

'1. That the Senate of Canada has, and always had since it was created, the power to amend Bills originating in the Commons appropriating any part of the revenue or imposing a tax by reducing the amounts therein, but has not the right to increase the same without the consent of the Crown.

2. That this power was given as an essential part of the Confederation contract.

¹ *The Canadian Forum*, Aug. 1924, 326-7.

² *Rules, House of Commons*, 78.

3. That the practice of the Imperial Houses of Parliament in respect of Money Bills is no part of the Constitution of the Dominion of Canada.'¹

The Committee based its conclusions on two principal grounds: first, that, since the British North America Act expressly forbids the introduction of money bills in the Senate, and is silent on the question of amendment, the inference is that the framers intended that the Senate should possess such powers; and secondly, that since the Senate was designed to protect the provinces it was intended that it should possess the power to amend money bills, as well as other bills, for the obvious reason that this duty could not otherwise be performed. The committee considered its conclusions strengthened by the fact that, whereas the power in the House of Lords would be comparatively useless since the House could be 'swamped' by the Executive, the Senate of Canada with its fixed numbers is entirely free from such a danger and was intended to be independent of the Executive and House of Commons. The report of the committee rests on good legal reasoning and authority, but the question is less one of constitutional law than of political power.

The report is, however, on firmer political grounds when its states:

'That the Senate of Canada in the past has repeatedly amended so-called Money Bills, in some cases without protest from the Commons, while in other cases the Bills were allowed to pass, the Commons protesting or claiming that the Senate could not amend a Money Bill.'

For such a statement there is ample evidence. In 1874 the Commons protested but accepted an amendment increasing the grants of land to settlers in the North-West Territories.² In 1903 the Senate struck out a clause allowing pensions to certain judges. The amendment was objected to by certain members of the

¹ *S.J.* 1918, 193-204.

² Bourinot, *Parl. Procedure*, 492.

Senate on the ground that the bill was a money bill, and the objection was upheld by the Speaker, who pointed out that the bill was simply an increase to the statutory expenditure. The ruling was, however, overruled by the Senate, and the amendment was pressed. The action of the Senate was later upheld in the House of Commons by the Prime Minister, and no protest was entered on the journals.¹ Tax bills have also been amended in the Senate, notably the Income Tax Bills of 1917 and 1918,² and the Inland Revenue Bill of 1920.³ In the Income Tax Bill of 1918 the Senate actually extended the tax to persons not included in the bill as it came up from the House of Commons, namely, those who were not residents but who were employed in Canada while residing in the United States, and exempted incomes from investments held in Canada by non-residents.⁴ Moreover, in 1886 the Senate actually increased from \$8000 to \$20,000 per mile, the maximum sum to be allowed a railway, should the Government subsequently take it over.⁵ In 1919, on the other hand, in the bill empowering the Government to purchase the Grand Trunk Railway, the Senate set a maximum limit to the interest charges which were to be fixed by the Board of Arbitration when no limit had been set by the House of Commons.⁶ But in the same year the Senate repudiated its former stand by sustaining its chairman's ruling that the Income Tax Bill of that year was a money bill, and that an amendment, slightly limiting the amount of taxation allowed by the bill as it came from the Commons, was out of order.⁷ The fact is that neither the Senate nor the House of Commons has been consistent in its stand as to the amendment of money bills or in the interpretation of the term. Indeed, the term 'money

¹ *S.D.* 1903, 1264 ff. *C.D.* 1903, 14291 ff.

² *C.D.* 1917, 5475 ff.

³ *S.D.* 1920, 863.

⁴ *S.D.* 1918, 663. 8-9 Geo. V. c. 25.

⁵ Northern and Pacific Railway Bill, *S.D.* 1886, 782-807.

⁶ *Toronto Globe*, Nov. 8, 1919.

⁷ *S.D.* 1919, 860-3.

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bill' has been conveniently extended to get rid of objectionable amendments, and contracted when necessary amendments were offered and could not be accepted otherwise. The instances cited will serve to show that the Senate's power over money bills is much wider at times than that of the House of Lords.

Part of the confusion, however, arises from the indefiniteness of the term 'money bill,' which had no exact connotation in the rules of the British Parliament until the Parliament Act of 1911.¹ This Act extends the term so as to include almost any kind of bill having to do with the raising, expenditure or accounting of public money. Yet the Act leaves much to the discretion of the Speaker of the House of Commons, and in the absence of authoritative rulings its meaning is still somewhat doubtful. On the other hand, Todd limits the term to such bills as have the peculiar preamble of supply and appropriation bills, which are handed by the Speaker of the Commons directly to the representative of the Crown for royal assent.²

This definition was accepted by Sir Wilfred Laurier as the only workable one.³ Yet neither House has followed either definition consistently, and, in fact, both have been violated in practice. The House of Commons still clings to its rule, and insists that the

¹ 'A money bill is defined as a public bill which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantees of any loan or the repayment thereof; or subordinate matters incidental to those subjects or any of them.' May, *Parliamentary Practice*, 12 ed., 396-7.

² 'We will now proceed to consider the subject of Money Bills, which are of three kinds, viz., Tax Bills, Bills of Supply, and Bills of Appropriation. All these Bills have a peculiar form of preamble, which intimates that the revenue or grant of money is the peculiar gift of the House of Commons, and such Bills are invariably presented for the royal assent by the Speaker of the House of Commons.' Todd, *Parliamentary Government in England*, ed. 1867, i. 525.

³ *C.D.* 1903, 14291.

Senate has no right to amend money bills,¹ yet it accepts amendments whenever the Ministry wishes this, or whenever it cannot get its way without yielding, as witness the occurrence of the session of 1924.

During the session of 1924 the Senate cut the estimates in three of the Branch Lines Bills, in two by cutting to about one-third the proposed mileage,² and in one by cutting the estimated costs per mile by about one-fourth.³ While some exception was taken to the amendments by the House of Commons, the right of the Senate to amend the bills does not appear to have been raised at all. But there was a more remarkable incident. The Pension Bill, which proposed to add to the regular pensions of returned soldiers the bonus which they had been enjoying, was completely changed in the Senate. The Senate took exception to the bill because it had received practically no discussion in the House of Commons and had come to the upper house in the dying hours of the session. The Senate decided that the bill was too important and complicated a measure to be put upon the statute books without a thorough discussion, but since the bonus would continue only until the following September some measure of relief for returned soldiers appeared to be necessary. Accordingly, the Senate substituted an amendment to continue the bonus as it was for another year.⁴ This the Government and House of Commons were compelled to accept.⁵

¹ The Speaker of the House of Commons, while declining to rule upon the amendments made by the Senate to the Income Tax Bill of 1917, declared in part: 'There is no doubt that the Senate has neither the power to increase the tax or impost nor to change the incidence of the burden of any such tax or impost in any such Bill' (*i.e.* bills appropriating revenue or imposing taxes or imposts). *C.D.* 1917, 5883.

² Pine Falls Branch, and Kingsclear Branch, *C.D.* 4193, 303 (unrev. ed.).

³ China Clay Branch, *C.D.* 4941, 4947. (unrev. ed.).

⁴ *Ibid.*, 5042-4.

⁵ A still more striking example was the amendment of the Home Bank Depositors' Relief Bill of 1925, which occurred too late to be considered in the text. In this instance the Senate cut to less than three-fifths the estimate passed by the Commons for relief, and changed the principle upon which distribution was to be made. See *C.D.* and *S.D.* during June 1925.

Should the Senate continue in the course on which it embarked during the session of 1924 its power and influence would undoubtedly increase. So long as the 'pork barrel' flourishes, which will probably be as long as the present system of financial control continues, no Opposition can be a potent check upon the spending proclivities of the Government. Since the Senate could not increase expenditures it could do little harm by exercising the power to curtail them, and it might, indeed, be very useful in reducing many items which neither the Government nor the Opposition had the courage to refuse. But because the Senate has no authority from the people it could never assume complete or even an important share of the responsibility for finance. The position which it might occupy was clearly laid down in the debate on the Committee's report:

'Though we may have equal powers with the House of Commons, they should be exercised by us in a different spirit. We have equal powers, but we have not the same mandate. If the Commons, when acting according to the letter and spirit of the Constitution, have a clear mandate from the country, their authority should go unchallenged in financial as in other matters. Our duty, I surmise, is to assure ourselves that the Commons have that clear mandate.¹

It is not without significance that when the speaker, Senator Dandurand, took his place as Leader of the Government and a member of the Cabinet upon the change of Government in 1921, he declared that he stood by the finding of the committee, and invited the Senate to amend money bills equally with others. Nor apparently has he questioned the right of the Senate on any occasion. Yet, as the attitude of the Commons and of the press generally upon the activity of the Senate during the session of 1924 indicates, the field of finance is a dangerous one. The complete control of the public purse has always been regarded by the Commons as their sacred right, whether they choose to exercise it or not, and any poaching by the

¹ *S.D.* 1918, 671 ff.

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Senate will undoubtedly be regarded with anxiety and distrust.

The Rejection of Commons Bills.

The following table will indicate the extent of the 'veto':

	Total.	Govt.	Priv. Memb. ¹	Priv.
Bills brought up - -	5553	2329	96	3128
Failed to pass - -	174	84	34	56
Per cent. failures - -	3·13	3·6	35·4	1·8

Of the bills which failed to pass, eight were withdrawn voluntarily by the Government, twenty-nine were rejected because they came up too late in the session for proper discussion, four were rejected because the promoters had failed to comply with the rules, and twelve were withdrawn without any comment whatever, and may therefore be regarded as relatively unimportant. Of the remaining one hundred and twenty-one bills, fifty-seven, or about half, were government measures, while some thirty were private members' bills and the remainder private bills.

Classifying, according to subject matter, the more important public bills (including both government and private members' bills), we find as follows:

Money bills ² - - - -	21
Business regulation - - - -	12
Trade agreements - - - -	1
Reform of criminal law and 'morals' legislation - -	14
Judiciary and other machinery of government (<i>including two 'money bills' included above</i>) - -	18
Labour legislation - - - -	6
Representation in the House of Commons - -	3
Miscellaneous - - - -	18

This list indicates in a general way the wide extent of the field in which the Senate has used the 'veto power.' Bills of practically every important kind have

¹ This does not include private members' bills on public subjects accepted by the Government and put on Government orders. Such bills are included under 'Govt.'

² In the sense of authorizing or providing for expenditure of public money.

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been rejected at one time or another, yet for the most part these have not been noticed by the public, which takes stock of the Senate only when it rejects a measure in which a vocal section of the electorate is interested. Yet the pruning-hook and the axe have been used in almost every corner of the legislative vineyard.

As in the case of amending legislation a usual charge against the Senate is that it has been the avenging angel of the party defeated at the polls and a barrier against reform. The latter charge we shall discuss in a later chapter, the former we shall examine as we did the Senate's amending activity.

Percentage of Government Bills from the Commons which failed to pass the Senate.



FIG. 5.

Same Party in majority in both Houses - - -



Majority of the Senate of opposite Party to majority of the Commons - - -



Percentage of Private Bills from the Commons which failed to pass the Senate.

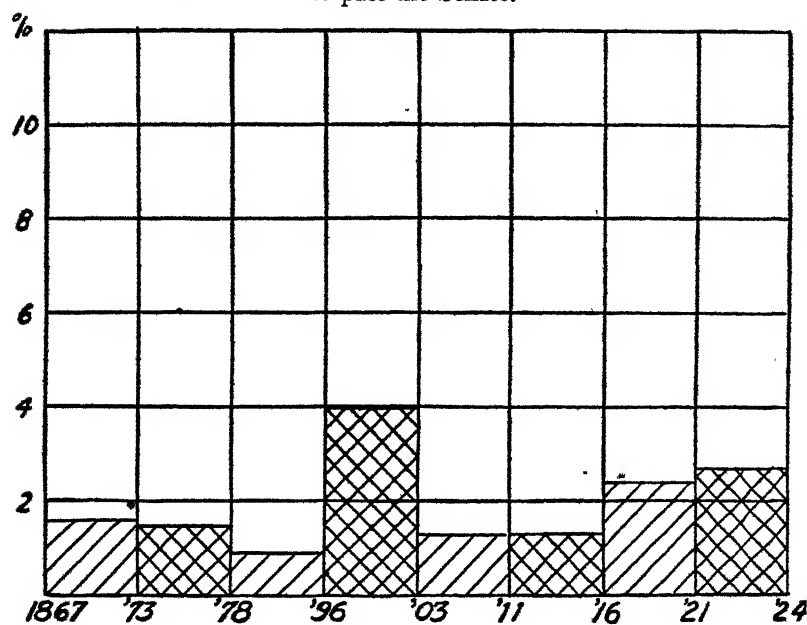


FIG. 6.

Same Party in the majority in both Houses - -



Majority of Senate of opposite Party to majority of the Commons - - - - -



The first diagram, that on government legislation, indicates that throughout the Senate's history there has been an extremely close relation between the use of the 'veto' and party majorities. More specifically it shows: (1) that during three out of the four periods when the majority of the Senate was politically opposed to the majority of the Commons there was a considerably larger number of government bills rejected than in the preceding or following periods; and (2) that during the periods when the same party was in the

majority in both Houses the Senate did, however, reject a few government bills. As regards private bills, the second diagram shows that party majorities have played a much less important part. The fact that in only two cases is there a marked change which coincides with the change in party majorities, while in one instance (1916 to 1921) the change is contrary to the change in party majorities, would indicate that in rejecting private bills party considerations have been only of minor importance. This we found was the case in amending private bills.¹

While the findings in regard to the rejection of government bills show in a much more pronounced way the party colour of the Senate's activity than is the case in considering amendments, the charge that the Senate has acted from none other than partisan motives in throwing out government legislation is not the whole truth. If it were we should not find the Senate rejecting any government bills when the same party had a majority in both Houses. While it has at such times rejected no bills of the first importance it has not always been merely a 'rubber stamp' for the House of Commons.

Thus, in 1868 it compelled the Government to hold over until the next session twelve bills extending the criminal law of the old Province of Canada to the Maritime Provinces, on the ground that the bills came up too late in the session.² In 1879 it rejected a bill to provide for two additional judges in British Columbia on the ground that the provincial Government was going to the country and had, under the circumstances,

¹ 'The fact that the Senate dealt with Bills sent up by the House of Commons—no matter whether the Houses were in political accord or not—in nearly the same numerical proportions, shows that the Senate was neither more languid nor quiescent under one condition than the other.' Sir George Ross, *The Senate of Canada*, 79.

This statement is incorrect. Sir George did not take into consideration the Bills amended by the Senate in such a way that the House of Commons (or the Government) refused to accept them. Neither did he distinguish between private bills and public or government bills. Obviously such an analysis is unsound. For his analysis, see pp. 76-8.

² See *S.D.* 1906, 484. *S.J.* 1868, *passim*.

no right to ask for the increase. The provincial Government was upheld at the polls and the Senate passed the bill in the following session.¹ The same year it rejected a bill to repeal the Marine Electric Telegraphs Act passed by the previous Government. The Act of 1874 had prevented a monopoly by the Field Telegraph interests, but the company was sufficiently powerful to induce the Macdonald Government to repeal the Act. The action of the Senate was undoubtedly beneficial, in that it prevented a powerful company from controlling the cable service between Canada and the United Kingdom, and from obstructing the introduction of wireless as it did in the United States.² In 1889 the Senate threw out a bill empowering the Government to construct a railway line in New Brunswick, on the grounds that it would be a useless waste of public money.³ The bill was never re-introduced. In 1909 a bill which allowed appeals in claims from the Exchequer Court to the provincial Supreme Courts in certain cases was rejected on the ground that it would lead to unnecessary litigation and confusion.⁴ In 1919 a bill bringing the Biological Board of Canada under the jurisdiction of the Minister of Marine and Fisheries was thrown out on the ground that the Board should be independent and without political interference.⁵ In 1919 and 1920 it stopped two government bills as retroactive in character and as interfering with vested rights.⁶ In 1921 it shelved a bill to provide for a National Research Council, because its establishment would be inconsistent with the policy of economy adopted during the same session in abolishing a similar body, the Commission of Conservation.⁷ Such occurrences, though all too few in

¹ S.D. 1879, 468 ; 1880, 246-7.

² Holland, 'The Red Chamber,' *Canadian Magazine*, Jl. 1911, vol. xxxvii. 163.

³ S.D. 1889, 690 ff. S.J. 250-2.

⁴ *The Globe* (Toronto), May 19, 1909.

⁵ S.D. 1919, 717 ff. ⁶ See post, pp. 148-9. ⁷ S.D. June 3, 1921.

number, show that the Senate has on occasion stopped even government legislation when it was politically in accord with the Government.

It cannot, however, be denied that the number and importance of government bills thrown out by the Senate at other times have been much greater. But even here it is incorrect to assume that the Senate in rejecting bills when it was politically opposed to the House of Commons acted entirely with a view to obstructing the Government and aiding the Opposition. It is only fair to assume that the Senate may have the public interest at heart as much as the Government has. Moreover, a new Ministry is always prone to try experiments which may or may not be of value to the State. The only fair tests, then, are whether the Senate's opinion has been overruled and whether the Senate or the government of the day has correctly interpreted public opinion. Such questions can only be answered by considering the more important bills *seriatim*.

Three of the rejected bills had to do with representation in the lower house. In 1874 a bill was introduced to rearrange the boundaries of a constituency in Ontario.¹ The seat of the member, a Government supporter, who had been elected at the general election just preceding the session, was contested, and a by-election was to be held shortly. The bill was a 'gerrymander' of the worst type, and had not even the usual excuse that it followed the decennial census. The Senate threw out the bill and the member was defeated at the polls. In 1899 and 1900 the Senate twice threw out a bill to readjust the representation of Ontario, on the ground that it was inexpedient to proceed with the bill until after the decennial census of 1901, when readjustment would be required by the constitution.² In 1903 when the House of Commons passed a new bill the Senate agreed.³ The opposition of the Senate to

¹ 'Tuckersmith' Bill, *S.D.* 1874, 266-79. *Canadian Monthly*, vol. 5, 526.

² *S.D.* 1899, July 20; 1900, 224 ff.

³ *S.D.* 1903, *passim*.

this bill was unquestionably partisan, but the attitude of the House of Commons was no less so.

The Liberal Party felt, however, that they had a just grievance. The 'Gerrymander Act' of 1882 had been frankly devised to 'hive the Grits' in Ontario, and the repeal of this Act had been a minor plank in the Liberal Party's platform in the campaign of 1896. The bill of 1899 and 1900 attempted to replace the boundaries enjoyed by the constituencies prior to 1882, but it was obviously introduced into Parliament in anticipation of the coming elections, and after Parliament had outlived more than half its legal existence. Moreover, it was forced through the House of Commons, as were previous redistribution bills, on a strict party vote against a virtually helpless Opposition. The bill of 1903, on the other hand, was framed by a committee of both parties, and was undoubtedly a fairer measure, as well as one required by the constitution. This procedure became a precedent. Redistribution bills are introduced now after the decennial census and at no other time, and are always framed by a committee of the House of Commons, and not by the Government. Thus, indirectly the Senate was instrumental in removing the 'gerrymander' from Dominion politics.

Several rejected bills have concerned the construction or purchase of railways by the government. In 1875 the Senate threw out a bill to provide for the construction of a railway on Vancouver Island from Nanaimo to Esquimalt. The railway was required by the revised agreement negotiated by Lord Carnarvon between the Dominion and the Province of British Columbia—the so-called 'Carnarvon Terms.' The charge that the Senate's action was instigated by partisan reasons only is not warranted. An examination of the division list on the motion to 'hoist' the bill shows that the motion carried by only three votes, while three Government supporters deserted the party and four Opposition members supported the Government.¹ The Govern-

¹ S.J. 1875, 283.

ment, indeed, incurred the charge of perfidy because of the desertion of its supporters in the Senate, and had great difficulty in explaining the failure of the bill. Whether or not Government influence led to its defeat, the action of the Senate was upheld by subsequent events. As Lord Dufferin, the Governor-General, told the people of British Columbia :

‘ The fact is that Canada at large, whether rightly or wrongly I do not say, has unmistakably shown its approval of the vote in the Senate. An opinion has come to prevail from one end of the Dominion to the other, an opinion which I find is acquiesced in by a considerable portion of the inhabitants of British Columbia, that the Nanaimo and Esquimalt Railway cannot stand upon its own merits, and that its construction as a Government enterprise would be at all events at present a useless expenditure of public money.’¹

In 1878 a bill was sent up to amend the Canadian Pacific Railway Act, and to allow the Government to build and lease the ‘ Pembina Branch ’ of the Pacific Railway.² The Senate amended the bill to require the assent of both Houses of Parliament to any contract or lease made by the Government. The Ministry objected on the ground that it was contrary to the uniform practice of Parliament to require assent of both Houses, but the Senate insisted that without the amendment the bill allowed altogether too much power to the Executive and gave Parliament no control whatever over the terms of the contract. The Government thereupon dropped the bill. On the advent of the Macdonald Government to office the following year a new bill was introduced with the principle of the Senate’s amendment embodied therein. A similar course, as we have seen, was followed in the Government Railways Act of 1910, when the Senate required full information to Parliament before a contract for lease or purchase was valid. Again in 1913 a bill amending the Government Railways Act, empowering

¹ Stewart, *Canada under the Administration of Earl Dufferin*, 481.

² Bourinot, *Parliamentary Procedure*, 287-8.

the Government to purchase 'feeders' for the Intercolonial Railways, was amended so as to require all contracts to be first laid before Parliament. The Government dropped the bill, but re-introduced it again in 1915 with the added proviso that no money should be paid on purchases without the sanction of Parliament; and the Senate agreed to the bill without opposition.¹

In 1897 the Laurier Government introduced a bill to confirm a contract for the purchase of the Drummond County Railway to admit the Intercolonial Railway into the City of Montreal. The bill was of a suspicious character; it followed closely on the heels of the election; and there were many charges in the press that those interested in the railway had assisted the Government financially in the campaign.² The contract called for a large expenditure for the purchase of a relatively worthless railway, and inasmuch as the powerful Grand Trunk Company, as well as the Drummond County Railway, had running rights over Victoria Bridge, it was urged that the contract would put the Intercolonial Railway at the mercy of the Grand Trunk. The Senate threw out the bill and appointed a committee of investigation, as did also the House of Commons. No evidence of corruption was found; a new bill which was introduced and passed the following session involved a much better bargain than the first. It saved the country probably half a million dollars and secured to the Intercolonial equal running rights with the Grand Trunk.³

¹ *S.D.* 1913, 1070; 1915, 476.

² 'The critics further say; that the agreement was entered into before any official report had been made on the property, and that the Order-in-Council authorizing the deal was actually passed before the Government was in power a month. That on the strength of this agreement a bank in this Province discounted notes for a large amount, the proceeds of which were applied partly to paying the Liberal expenses in the Quebec provincial elections, partly the Liberal expenses in the Dominion by-elections, partly to paying the deposits in the contestation of Conservative seats, and partly to subsidizing heavily certain Liberal newspapers.'—The *Montreal Star*, Quoted *S.D.* 1897, 903 ff.

³ See speech by Bowell, *S.D.* 1899, 544, in which he claimed that the

In 1899 a bill was introduced to confirm another railway contract, with Mackenzie and Mann, the railway contractors, to construct a railway into the Yukon. In return for the construction of the railway an enormous land subsidy was granted to the contractors. The Senate rejected the bill on the grounds that the land was far too valuable to be handed over to private individuals and that the bargain had been struck in secret without allowing any opportunities to other contractors.¹ Later events showed that the land offered to the contractors was virtually worthless, and no other favourable offer for the construction of an all-Canadian railway to the Yukon was made. The financial standing of the contractors and their influence later in Canadian politics, are good indications, however, that even had the contract been confirmed, it would not have been carried out without the Dominion paying heavily for the railway.

In 1912 the Senate defeated a bill to grant a subsidy to the Ontario Government Railway,² but accepted the bill in the following year when it was re-introduced. The defeat of the bill in 1912 was largely the fault of the Government. It came up towards the close of the session, and the Leader of the Government in the Senate could give little information respecting it. It was generally believed by the Senate that the road was being operated at a profit and, therefore, was not in need of a subsidy. The following year the bill was supported by Sir George Ross, the Leader of the Opposition, who had not been present in the previous year when the bill was before the House. He pointed out that the road was operated at a loss, and that its construction had opened up a large area for colonization, and was, therefore, of advantage to the whole Dominion. This time the bill passed.³

new contract saved the country \$753,333. Also Powell, *Senate Reform* (Speech in Ontario Legislature published as a pamphlet 1899, Library of Parliament). This claimed \$491,541 on actual purchase price.

¹ *S.D.* 1898, 299-317, 542, 998.

² *S.D.* 1912, 949-51.

³ *S.D.* 1913, 1044-59. No less important in checking the autocracy of

In 1912 the Senate also killed by amendments a bill to create a Tariff Commission. A Tariff Commission 'to take the tariff out of politics' had been a minor 'plank' in the Conservative Party's platform in 1911, and, to redeem the pledge, the bill was introduced in the first session of the new Parliament. The Senate's amendments required the Commission to report specifically on the standing of any industry for which it recommended increased protection.¹ The Government refused the amendment and dropped the bill; nor was it ever re-introduced. The failure to press the bill subsequently, and the refusal to accept any compromise, throw doubt on the sincerity of the Government, and also indicate that there was no general demand for the Commission by the public.

None of the bills which we have considered is, however, of equal political importance with the Naval Bill of 1913. Before the War the naval policies of the two great parties in Canada were sharply divided, the Liberals favouring a navy manned and controlled by the Dominion, the Conservatives advocating assistance to the British navy and dependence upon it for protection. The Liberal policy had borne fruit in the Naval Act of 1909, which had provided for the nucleus of a Dominion navy. In the campaign of 1911 naval questions had been completely overshadowed by the issue of reciprocity with the United States. In the summer of 1912 Mr. Borden, the Prime Minister, while on a visit to Great Britain, became convinced of an emergency in the struggle between Great Britain and Germany for naval supremacy, and in the following session he brought in a bill for the contribution of

the Cabinet in the expenditure of public funds was the defeat of the Highways Bill in both 1912 and 1913.

¹ The Senate amendments required the Commission to report: (a) The number of factories now existing and the number of hands employed; (b) a list of shareholders and the number and amount of shares held by each; (c) dividends paid during each of the ten preceding years; (d) wages of hands, and (e) total amount of goods of the kind on which increase of duty was recommended consumed in Canada whether home-made or imported. *Canadian Annual Review*, 1912, 231.

\$35,000,000 to the support of the British navy. It was declared that the bill would not constitute a precedent, but was simply an emergency measure. The bill was of a highly controversial nature, and was put through the Commons only by the adoption of rules of closure for the first time in the history of the Canadian Parliament. The Senate killed the bill by the following resolution: 'This House is not justified in giving its assent to this bill until it is submitted to the judgment of the country.'¹ Though the bill was the most contentious one in several Parliaments the Government apparently did not contemplate a dissolution on its defeat; nor was it re-introduced, though a session intervened before the outbreak of the War. The result was that in August 1914 Canada was less prepared to render immediate assistance to the Empire than were her sister Dominions, New Zealand and Australia.

In 1913 the outbreak of war was quite unforeseen in Canada by all but the prophetic few, and it is unfair to charge the Senate with shortsighted partisanship or with provincial-mindedness. The only fair tests are: was the Senate acting against the public opinion of the Dominion, and has its action been overruled by subsequent events or opinion? An examination of the press of the period shows that opinion on the Naval Bill was hopelessly divided. The party press, with little exception, supported their respective party policies. Organized labour, the President of the Trades and Labour Congress of Canada declared, was also divided, but generally against the bill. The organized farmers of the western provinces were almost unanimously against it and demanded a referendum. The Orange Order was a strong supporter of the Government's policy. On the other hand, the opinion of French Canada was more or less chaotic but generally opposed. A fair-minded critic can scarcely say that the Government had any mandate, either from opinion current

¹ *Canadian Annual Review*, 1913, 140 ff.

throughout the Dominion, or from the election of 1911, to press the bill. If we grant the principle of government by public opinion it is difficult to arrive at any other conclusion than that the Senate was justified in suspending the bill until the people had more clearly expressed their will.¹ Moreover, history would seem to be on the side of the Senate rather than on that of the Government. The whole trend of political development in Canada for the preceding three-quarters of a century had been towards autonomy, and, in the Empire, towards decentralization. Nor has the policy of direct contributions to the upkeep of the British navy been a question of practical politics in Canada since 1913.

The fate of the Naval Bill and other government legislation during 1912 and 1913 was no doubt one of the causes which led the Borden Government to introduce in 1914 in the House of Commons a resolution to increase the representation of the West in the Senate. Since the admission of Manitoba as a province representation in both Houses had been increased from time to time by statute. Representation in the House of Commons was, of course, taken care of by the redistribution of seats required after each decennial census. The Government now proposed to amend the British North America Act of 1867 by making the West a separate division having a representation of twenty-four in the Senate as had each of the other three divisions. The Senate amended the resolution by requiring that no increase in its membership should take place until after the next election for the House of Commons. The Government consequently dropped the proposal, though it was introduced again the following year. When the amendment was again pressed it was accepted and was embodied in the British North America Act of 1915. Doubtless the majority of the Senate (who were

¹ *Ibid.* 178 ff. On the other hand, Professor Stephen Leacock expressed the view that had the Government gone to the country there was no doubt it would have been sustained. But, he added, 'It would be folly indeed for the Government to go to the country on the mandate of such an upper chamber as we possess.' *National Review*, July 1913.

of the Liberal Party) were influenced by party considerations, since any new appointees would have been Conservatives, yet equally partisan were the motives of the Government.

Rejection of Government Legislation 1922 to 1924.

During the three sessions after the Liberal Government assumed office in 1921 the Senate rejected or emasculated some twenty-one government measures. Since it is too soon yet to apply the test whether the Senate has been upheld by subsequent events, we can only consider the question of whether there appears to have been reasonable ground in each case for such action. In 1923 the Senate 'hoisted' by an overwhelming majority a bill for the construction of branch lines for the Canadian National Railways. The bill proposed to authorize the National Railways Board to build during the following three years some twenty-nine branch lines at an approximate cost of \$28,000,000. Both mileages and costs for all the branches were only estimates, and no maximum was set to the sum which might be spent thereon. The majority of the Senate, among whom were six prominent Government supporters, considered the bill a 'blanket' measure of the worst type. They based their objections on the following grounds: it was introduced without warning during the last few days of the session; it handed over to the National Railways Board the control over railway construction hitherto enjoyed by Parliament; it purported to be recommended in every way by the Board, yet it included a railway in the Province of Quebec which had been refused by several Parliaments; and, finally, past experience showed that the estimated costs were far too low, and, since the bill provided no maximum either for mileage or costs, the ultimate total was a mere guess. Moreover, while the bill was before the Senate the Government introduced in the House of Commons a measure to allow the Minister of Finance a general and practically unlimited right

to borrow for the construction of the proposed lines. This seemed to confirm the suspicions of the majority of the Senate. While rejecting the bill, the Senate was careful to point out that it was not opposed to the construction of many of the lines, provided there was proper supervision and discussion by Parliament. It suggested that, if the measure were re-introduced, it should take the form of a separate bill for each line in order that Parliament could deal more intelligently with the matter,¹ a suggestion which was adopted in the session of 1924.

In the session of 1924 the House of Commons approached the problem in a much more critical attitude. Moreover, the Government was more careful in framing its bills. Each bill provided that the estimated costs were not to be exceeded by the Company by more than fifteen per cent.² The Railway Committee of the House went farther and inserted in each bill the following clause :

‘ Should it appear to the company upon making a final survey of the said line of railway that the expenditure involved in the completion thereof will exceed the limits specified in this Act, the company shall not commence nor proceed with the work upon the said line of railway without first obtaining the approval of Parliament.’³

Thus far the actions of the Senate in the preceding year would appear to have been justified.

Eventually all the bills passed the House of Commons and were sent up to the Senate, where seven were rejected and three others drastically amended. Four were rejected on the report of the Railway Committee, to which all were referred, and these four not even the Leader of the Government attempted to revive. It was recommended that two of these should be deferred until the following year, because the Company had not

¹ *S.D.* 1923, 1239-47, 1281-1301.

² *S.D.* 1924 (Unrevised edition used for 1924 except where specified), p. 562.

³ *Railroad Trainman*, July 1924, 490.

yet decided definitely upon the location of the lines¹; one, which in any case did not contemplate action by the Company until the following year, was deferred in order that the Company might mature its plans in regard to grades, and study more carefully the question of electrification²; the fourth, declared on the floor of the Senate to be a 'political' line promised in every election campaign since 1896,³ was thrown out on the grounds that it would not be a paying line and that the people whom it was intended to serve already had adequate communications by sea.⁴

The remaining bills rejected give more reason for the charge of partisanship, since in these cases the majority compelled the Senate to repudiate the report of its own committee, which had recommended the lines, and the bills were defeated on the third reading. Yet even in these cases the Senate would appear to have found cause for its action. One bill proposed to build a branch into a well-settled district in southern Saskatchewan, but the bill provided three alternative routes from which the Company, with the approval of the Minister of Railways, might choose. The line might be built from Radville one hundred and fifteen miles, from Ritchie forty-eight miles, or from Bengough seventy-one miles. The bill of the previous year had provided for the shortest route, but as the proposal came to the Commons in 1924 it provided for the longest, which was admittedly the most difficult, and which had as yet been only tentatively surveyed. Nor would it serve many more settlers than either of the other two shorter routes. As for the third route, the line from Bengough, it was freely admitted by an ardent supporter of the bill in the Senate that this route had been added by the House of Commons at the instigation of the member through whose constituency it would

¹ Kelvington Branch, *S.D.* 565-6; Nipawin, *C.D.* 2426-8; *S.D.* (rev. ed.), 572.

² Rousseau-Laurent, *S.D.* 565.

³ *S.D.* 222 (rev. ed.); *v.* also *C.D.* 2418.

⁴ *S.D.* (rev. ed.), 630.

pass. The hearing before the Railway Committee of the Senate showed that there was no unanimity as to the best location even by the officers of the Company or by the settlers themselves. An attempt was made to leave the question to be solved by the Railway Commission, but it was found that it had no final jurisdiction. Under such conditions the Senate 'shelved' the bill until the route should be more definitely fixed.¹ A second Saskatchewan branch, one from Lloydminster, was rejected on the ground that it would run parallel to a line of the Canadian National already in existence, and close to a branch of the Canadian Pacific previously chartered and then under construction. Under such conditions the community would be served at any rate, and it was felt that the proposed line would be an unnecessary duplication.² A third line, the Turtleford-Hafford branch, although it would afford needed railway communication to the settlers, was rejected on the ground that it would not increase the business of the National Railways, since all the business from that district came to the line already. Even the memorandum of the Company recommending the bill did not promise a profitable return for the investment but justified it solely on the ground of service to the settlers.³

In addition to the above reasons it was stated in debate that there were other grounds for suspicion of the branch-line programme. Although all the bills purported to be recommended by a general covering letter from the President of the National Railways, when the Railway Committee of the Senate attempted to obtain a statement signed by a responsible official of the Company that each particular bill was supported and desired by the Company, none was forthcoming.⁴ Again, an official of the Company in giving evidence before the Railway Committee admitted that it was not expected that all the lines recommended

¹ *S.D.* 1924, July 3. *C.D.* 2424.

² *S.D.* 1924, 614 ff.

³ *S.D.* 1924, 605-14.

⁴ *S.D.* 617 ff.

would pay their way.¹ Moreover, even the Leader of the Government in the Senate admitted that, in the case of one of the lines, the Company had looked upon only part of it as likely to be profitable.² Under such circumstances the branch-line programme had the appearance of an omnibus loaded with some lines desired by the National Railways and some added to grease the machinery of the legislative mill.³

It is of advantage here to estimate the effect of the use of the pruning-hook on the branch lines bills. In the first place it cannot fairly be said, as was done by a large section of the press from Atlantic to Pacific, that the Senate was obstructing the National Railways. In neither session did it oppose the principle of branch-line construction.⁴ It insisted, rather, that each branch line should be accepted or rejected on its merits as a business investment.⁵ In so doing it compelled

¹ S.D. 640.

² Guysborough Line, N.S., S.D. 611.

³ Even Senators, though likely to obtain little local notoriety thereby, are inclined to look sometimes for the *quid pro quo*. E.g. during the debate on the branch lines two Senators from Prince Edward Island refused to vote for any of the bills until government railways in that province were assisted.

⁴ It was freely asserted in several newspapers that the Senate was seeking to undermine the National Railways in the Interests of the Canadian Pacific Railway in which it was declared several senators were stockholders. (See e.g. the *Globe* and the *Manitoba Free Press*, June and July 1924.) The charges gained currency by the appearance before the Railway Committee of the Senate of officials of the Canadian Pacific. Yet, though the rules of Parliament would allow any interested person or corporation to appear either in support or in opposition to such legislation, the officials appeared only after requests were made by the Senate and against their own opinion that their actions would be misunderstood by the public (S.D. 1924, 319 ff.). They appeared, moreover, only in the case of two lines, and were examined only in regard to the nature of the country through which the proposed lines would pass. As for senators being interested in the Canadian Pacific, the only director of the Company in the Senate refused to take part either in debate or by vote on the bills (S.D. 1924, 549). The charge, however, is ridiculous if for no other reason than that except in the case of two of the proposed lines there was little possibility of competition between the two Companies.

⁵ Sir James Loughheed, Leader of the Opposition in the Senate, declared in discussing the bills 'not patriotism but business must govern the Canadian National Railways,' and while a policy of branch line construction must be entered upon 'the paramount consideration must be early prospective earnings.' S.D. 295 ff. The policy of the Company, and presumably of the Government, as defined in Sir Henry Thornton's covering letter is summed up in the tests he laid down for the proposed branches: 1. Con-

the Company and the Government to go slowly in committing the country to new capital expenditures, and refused those which would not bring in an economic return at an early date. In this it undoubtedly safeguarded the national treasury. Secondly, by insisting that routes be definitely decided upon before bills were accepted it certainly removed some tempting opportunities for 'political' railway-building. That this was not a mere phantom of the Senate's imagination there is considerable evidence. The National Railways Board is not independent of the government of the day, being appointed and subject to dismissal by the Governor in Council. Indeed, when the Liberal Government came into office after the election of 1921, all the members of the existing Board were dismissed or induced to resign, and new members, practically all of whom were known supporters of the new Government, were appointed in their places.¹ Moreover, in certain cases the decisions of the Board are subject to the approval of the Cabinet.² Thirdly, by insisting that new lines of the National Railways should not compete with existing lines either of the National Railways or of privately-owned corporations, the Senate was simply adopting the principle accepted unanimously by the Commons on the report of a special committee appointed during the session of 1924, a principle which the Commons themselves unfortunately failed to follow consistently.³

sideration of the work already done on the lines ; 2. Strategic, economic and traffic value ; (3) Relief to the settler ; (4) Financial condition of the Dominion. *v. S.D.* 293-5.

¹ This was admitted by no less a supporter of the Government's branch line programme than the *Manitoba Free Press*. See editorial, 26th May, 1924.

² 9-10 Geo. V, c. 13.

³ 'Your Committee desires to direct the attention of the Government to the apparent unnecessary competition and duplication of services between important centres by the Canadian National and the Canadian Pacific Railways, and to suggest that the railways be invited to consider the whole question with a view to the elimination, wherever possible, of unnecessary duplication and competition, so as to conserve the revenues and resources of both companies while still rendering adequate service to the public.' Committee on National Railways and Shipping. *C.J.* 1924, appendix 5, xv.

In addition to the branch lines bills some eleven other government measures failed in the Senate during the period 1922 to 1924.¹ Of these the most important were the Lake of the Woods Control Board Repeal Bill,² the Industrial Disputes Act Amendment Bill,³ the Canteen Funds Disposal Bill, and the Canada-Finland Trade Agreement Bill. The first two of these I will leave for discussion later, the last two were rejected towards the close of the session of 1924 on the ground that they had received too little attention by the House of Commons and were ill-digested. The Canteen Funds Disposal Bill was further objected to because it provided for too much and too expensive machinery for distribution of the funds which belonged to the returned soldiers rather than to the Government.⁴ The Trade Agreement Bill was postponed largely on the representations of certain paper manufacturers who declared that the bill was prejudicial to their interests, and that, as it had slipped through the Commons without their notice, they ought to have a right to appear and be heard in the matter.⁵ The opposition to both bills was non-partisan, nor was it directed against the principle of either bill, but against the haste and lack of consideration of the Commons in pressing the bills during the closing days of the session.

The foregoing review of legislation 'vetoed' by the Senate appears to lead inevitably to the following conclusions :

(1) The Senate has used the 'veto power' upon government legislation with judicious care and without caprice. With the possible exceptions of the Redistribution Bill of 1899 and 1900, which at best was a highly partisan measure intended to benefit the party in office, the Yukon Railway Bill of 1898, the Temiskaming

¹ Some of these bills are discussed in the next chapter.

² *Post*, pp. 139-40.

³ *Post*, chap. viii.

⁴ *S.D.* July 17, 1924.

⁵ *S.D.* 1924, July 16-17. The debate on the bill occupies about five and a half columns in the Commons' Hansard and about twenty-six in that of the Senate.

Railway Bill of 1912, and the bills rejected from 1921 to 1924, of which it is, perhaps, too soon to judge, the Senate's action has been upheld by subsequent events. In the great majority of cases where the Senate defeated the policy of the government of the day or suspended it, the Senate, and not the Government or the House of Commons, proved itself the better interpreter of public opinion and the better judge of public policy.

(2) The Senate has never defeated the real will of the people or obstructed it when that will was clearly expressed.¹ A Government which comes into power through the mechanics of election cannot be said to represent the opinions of the people on all public questions, though it may on the specific issue or issues upon which the election turned. The autocracy and arrogance of a political party which has conquered at the polls, and which through questionable means can maintain itself in office, is an ever-present danger in Canadian politics. No Government, however large its majority, however overwhelming may have been the defeat of its opponents, has an unlimited mandate. In Great Britain the prospect of the next election is always a potent check upon the Government; in Canada it is far less so because of the sinister means which every Ministry employs to keep itself in office. A check upon the majority of the House of Commons is a sound requirement in Canada. This the Senate has been when its majority has been politically opposed to the majority in the Commons. On such occasions the Senate has not abused its power. On the contrary, it has been the guardian of the rights and interests of the people against the Government and temporary party

¹ 'If there was a deadlock between the House of Commons and the Senate, nothing short of a revolution could solve the difficulty . . . no constitutional remedy within our grasp could bring the Senate to a different view.' Sir Wilfrid Laurier (*C.D.* 1908, 1571-2). From the legal standpoint this is correct, but it rests on no grounds of fact. The Senate has never claimed to be above public opinion. Since it does not represent any class in the community it has no foundation on which it could base opposition to the clearly expressed wishes of the country. Such a statement as Sir Wilfrid Laurier's, interpreted in any other way than as a mere technical legality, is, therefore, absurd.

majorities. 'According to my experience,' declared a prominent Canadian statesman, 'the will of the people is very often better expressed after a check, and after a period of searching and critical discussion which generally arises from such a check, than it is in the first instance. It must also be remembered that, under our system, the power of the Cabinet tends to grow at the expense of the House of Commons.... The Senate is not so much a check on the House of Commons as it is upon the Cabinet, and there can be no doubt that its influence in this respect is salutary. In twenty years at Ottawa I have never known a case in which a Government was anxious to take the verdict of the people on a bill rejected by the Senate.'¹

There is further evidence that the Senate has not obstructed the popular will in the fact that the 'safety-valve' of the constitution—the provision to create four or eight additional senatorships (until 1915 three or six)—has never been used. In 1874 the Mackenzie Government applied to the British Government for permission to appoint additional senators. The request was, however, refused. Since no emergency was shown to exist the British Government held that the use of the provision would be a violation of the federal compact.² While a similar request would scarcely be refused now on like grounds, the significant fact is that no such request has been made since 1874.

(3) The Senate to some extent has protected Parliament against the encroachments of the Cabinet. This is particularly to be observed in the amending of various

¹ Sir Clifford Sifton, in Miller (ed.) *New Era in Canada*, 50 (italics mine).

² 'I have been in Parliament since 1896... I have seen the Senate go counter to a Liberal Government, and I have seen it go counter to a Conservative Government. I am bound to say that, in my humble judgment, the Senate is of most use when, by reason of its majority not being in accord with the majority of the Commons, political alliances do not govern the judgment of Senators as thoroughly as they do when the majority is the same in both Houses. It is when the Senate is liable to bring upon itself the oburgation of the Government and its supporters that it justifies its existence and protects the interests of the people, Hon. Frank Oliver, *C.D.* 1914, 5294.

³ For a full discussion of this incident see *S.D.* 1877, 197 ff. See also *Sessional Papers*, 1877, No. 68.

Government Railway bills. Majorities in the House of Commons have not been slow to grant more power to the Executive, particularly in the matter of government ownership of railways and in the construction and control of other public works. Under such circumstances the executive control of public expenditure has not been an unmixed blessing. The Senate's action in amending or vetoing such bills as the Railway Bills of 1878, 1897, 1910, 1913 and 1923, has undoubtedly tended to subordinate the activities of the Ministry to the supervision of Parliament. And, incidentally, it may not be going too far to say that the Senate has saved the country in actual cash, by such activity, more than the total cost of its upkeep since federation.

(4) On the other hand, it would be shutting our eyes to facts to maintain that party considerations do not move the Senate. While in dealing with private bills it has not been influenced to any appreciable extent by party considerations, undoubtedly in the matter of government legislation it has watched its political enemies more carefully than its political friends. In many cases, when government supporters were in a minority in the Senate, party measures have been rejected by the majority on the very grounds upon which they were opposed by their political friends in the Commons.¹ Without question, when the same party has been in the majority in both Houses, many bills which ought to have been amended or rejected have been passed because wanted by the Government, as, for example, the 'Great Gerrymander' of 1882 and many of the railway subsidy bills passed during the Macdonald and Laurier régimes. On such occasions the Senate may have grumbled a little, but too often it has forsaken the public welfare for the party advantage. Indeed, it has been only when majorities in the two Houses were of different parties that the Senate has justified its existence as an independent check upon the government of the day.

¹ E.g. in the case of the Naval Bill, 1913.

VII

A PROTECTOR OF RIGHTS

Provincial Rights. The career of the Senate as the protector of provincial and sectional rights, the rôle it was ostensibly created to play, has been a varied one. In part this is due to the fact that the Senate is only incidentally the protector of the provinces or of the sections, and performs such duties only through its functions as a secondary branch of the legislature. While questions of provincial rights have played a considerable part in federal politics, they have been concerned quite as much with the federal power of disallowance, with boundary questions, or with subsidies, as with federal legislation. The Senate, therefore, has rarely been appealed to as the champion of provincial rights, and, as the following instances will show, even when appealed to it has not consistently supported the claims of the provinces.

One class of legislation which has caused friction between the Dominion and the provinces has related to the franchise for election to the Dominion Parliament. In 1874 the Mackenzie Government brought in a bill to accept the provincial franchise in every province, except Prince Edward Island where manhood suffrage existed. The Senate amended the bill so as to accept the Island's franchise as it stood, and, despite the opposition of the Government, carried its point.¹ Similarly, in 1898, when the Laurier Government passed through the Commons a bill to re-adopt the provincial franchise,

¹ *Canadian Monthly*, 1874, vol. v. 527; *S.D.* 1874, 380.

the Senate again compelled the Commons to accept an amendment protecting that of Prince Edward Island.¹ On the other hand, in 1885, when a federal franchise was established, the Senate acquiesced on a strict party vote.² Again in 1918, on the Woman Suffrage Bill, the majority of the Senate refused to accept amendments offered in the interests of the provinces which had not yet adopted woman suffrage.³

In some cases, indeed, the Senate has declared flatly against the policy of a province. Thus in the bill of 1882 the Senate inserted an amendment to enfranchise government railway employees in Nova Scotia who had been disenfranchised by the provincial government.⁴ On the Franchise Bill of 1898 it insisted on amendments requiring the allowance of appeal to the courts in New Brunswick, Nova Scotia, and Manitoba, where there were property qualifications for the suffrage, and where the assessor's estimate of property determined the right of the citizen to vote. It withdrew its amendments only on the promise of the Government that it would endeavour to persuade the provincial governments concerned to adopt the principle advocated by the Senate.⁵

On several occasions the Senate has refused requests of provincial governments for legislation. In 1879, when the Government of British Columbia asked for an additional judge for the Supreme Court of the province, the Senate threw out the bill on the ground that a provincial election was pending.⁶ In the following year, however, the provincial Government, having been sustained at the polls, renewed its request and the Senate passed the bill without objection.⁷ A similar course was followed in the matter of creating three new judgeships in Quebec.⁸ Of more recent interest has been the stand of the Senate on the question of the Lake of the Woods Control Board. In 1919 the Government

¹ *S.D.* 1898, 1237-1328, *passim*.

² *S.D.* 1885, 1194-1272; 1329-1344.

³ *S.D.* 1918, 411-430.

⁴ *S.D.* 1882, 712-740.

⁵ *S.D.* 1898, 1273.

⁶ *S.D.* 1879, 460-71.

⁷ *S.D.* 1880, 246 ff.

⁸ *S.D.* 1900, 953 ff., 1901, 415 ff.

of Ontario and the federal Government agreed to set up a joint control board over the Lake of the Woods watershed. The Ontario Government, failing to carry out its part of the bargain, requested that Dominion legislation providing for the Board should be repealed. The Dominion Government brought in a repeal bill in 1922 and 1923, but on each occasion the Senate rejected the bill on the ground that the general interest of the Dominion was involved, since the watershed included Dominion lands within the Province of Manitoba and extended across the international boundary line. The Senate contended that, should the Act be repealed, it would throw the complete control of the water-levels of the lake and of the whole watershed into the hands of a private corporation.¹

On the dangerous questions of language and education the Senate has consistently followed the lead of the House of Commons. Thus, on the Manitoba Act of 1875, which provided the Catholic minority in the North-west Territories with separate schools, although several of the Government supporters, including George Brown, were opposed to this principle, the majority insisted on accepting the decision of the Commons.² Again, in 1890, on the North-west Territories Amendment Bill, in which the Commons had compromised by allowing the legislature of the territories to settle the language question, the Senate refused to re-open the question.³ Similarly, in 1905, on the bills creating the two new provinces of Alberta and Saskatchewan, although several amendments were offered from both sides of the House, the majority of the Senate refused to allow interference with the compromise reached in the Commons.⁴ Although from time to time resolutions on the rights of racial and religious minorities have been introduced and debated at length, the Senate has rarely added fuel to the fire of racial and religious strife.

¹ *S.D.* 1922, 629-51.

² *S.D.* 1876, 281.

³ *S.D.* 1890, 678.

⁴ *S.D.* 1905, *passim*.

One case when the Senate did protect the provinces is worthy of particular mention, namely, the Highways Bill of 1912 and 1913.¹ This bill proposed the expenditure of \$1,000,000 in building highways in co-operation with the provinces. Moneys were to be advanced at the discretion of the Minister of Public Works to assist any province in building roads acceptable to the Minister, provided the provincial Government agreed to expend a sum equal to that advanced by the federal Government. Finally, the Minister might, with the consent of the province concerned, assume full control of the work on the proposed roads. The objectionable features of the bill were that there was no rule of apportionment, and that there was nothing to prevent the Minister from spending the whole sum in a single province. The Senate amended the bill on both occasions by striking out the clause empowering the Minister to take over the control of road-building, and in each case the Government dropped the bill rather than accept the amendment. The majority of the Senate felt that this bill laid the way open to an encroachment upon the control hitherto exercised by the provinces over their own public works, an encroachment rendered the more insidious because accompanied by an offer of ready cash, and that it was distinctly contrary to the principle upon which the federal subsidy provided for in the British North America Act and in subsequent amendments—that federal aid should be apportioned to the provinces generally on the basis of their population—has been distributed. In the words of Sir Richard Cartwright, it was ‘a bill to make the British North America Act so much waste paper.’ It is a noteworthy fact that the Highways Bill of 1919,² the Agricultural Education Bill of 1913,³ and the Technical Education Bill of 1919,⁴ all provide for a distribution to the provinces generally in accordance with their

¹ *Canadian Annual Review*, 1912 and 1913; *S.D.* 1912, 1913, *passim*.

² 9-10 Geo. V, c. 25.

³ 3-4 Geo. V, c. 5.

⁴ 9-10 Geo. V, c. 73.

population, thus confirming by statute the principle laid down by the Senate in its objection to the Highways Bill of 1912 and 1913.

The 'general advantage' clause of the British North America Act left the way open for an enlargement of federal power through the control of private corporations. Until recent years the interpretation of this clause lay largely with Parliament, rather than with the courts. Consequently the powers of the provinces have been considerably diminished, particularly as to control over railways. The Railways Act of 1883 declared that certain railways were 'for the general advantage of Canada,' and therefore under the control of the federal Parliament.¹ In 1903 the Government introduced a bill to set up a Railway Commission and to consolidate the various Railway Acts. It proposed, by the use of the 'general advantage' clause, to extend the control of the Railway Commission over all railways which touched or crossed any railways already under the control of the federal Parliament. To this proposal the Senate raised strenuous objections and, after a free conference with the House, succeeded in restricting the control of the Railway Commission over provincial railways to certain matters specified in the Act and to those only.² In this way the control of the provinces and their municipalities over local railways was left, in part at least, intact.

In 1906 an important debate occurred on a motion introduced by Senator David, to the effect that the mere inclusion of the phrase 'for the general advantage of Canada' would henceforth not be considered sufficient grounds for passing legislation in regard to works situated wholly within a province, but that there must be sufficient evidence that the general advantage was involved.³ While the Senate adopted the resolution, it does not seem to have followed it consistently. Although some bills have been rejected on this

¹ Lefroy, *Canada's Federal System*, 72.

² *S.D., S.J., C.D., C.J.* 1903, *passim*.

³ *S.D.* 1906-7, 660 ff.

ground¹ others have been accepted, even in opposition to the objection.²

In the matter of the legal rights of the provinces, the courts, not the Senate, are the ultimate safeguard. The passing of legislation *ultra vires* of the federal Parliament leads, however, to unnecessary litigation and friction. On some occasions the Senate has prevented such bills from passing, but on others it has not. In 1882 when the Government introduced a Factories Bill to regulate the conditions of labour in industry, the Senate pointed out that it was a distinct invasion of the legislative field of the provinces, and the Bill was withdrawn.³ For the same reason, in 1908, a bill to promote co-operative enterprises passed the Commons by a large majority but was rejected in the Senate.⁴ Again, in 1910, a bill to regulate mortgages was also defeated.⁵ On the other hand, the License Act of the Macdonald Government passed the Senate without difficulty, though there was little doubt that it invaded the provincial field.⁶

Such instances throw much doubt on the value of the Senate as a guardian of provincial or sectional rights. Party loyalty has always been stronger in the Senate than sectional or provincial loyalty. The only important case in which the Senate withstood the government of the day on the grounds of provincial rights, when the same party was in the majority in both Houses, was the Railway Acts Consolidation Bill of 1903 already mentioned. While on occasion a few individual senators have voted against their party, with the motive of protecting their particular provinces,

¹ E.g. Ontario and Michigan Power Company's Bill 1908. *S.D.* 382, *S.J.*, 228, 299. *The Globe*, March 31, April 1.

² E.g. Liverpool and Western Railway Company, 1909. *S.D.* 275. North-Western Railway Company, 1909. *S.D.* 377-82.

³ *S.D.* 1882, 353, 688.

⁴ *S.D.* 1908, 1596. *Canadian Annual Review*, 1908, 30.

⁵ *S.D.* 1910-11, 118-28, 684.

⁶ An amendment to refer the Bill to the Supreme Court was defeated by 17-12, *S.J.* 1883, 291.

there does not seem to be a case on record where provincial or sectional loyalty has completely broken down party lines. Yet party loyalty is not peculiar to the Senate. Sir Wilfred Laurier and Sir John A. Macdonald were able many times to carry party adherents from a particular province or section against local interests and sectional sentiments. Moreover, under the system of appointment it frequently happens in the Senate that the representation of a particular province or section entirely misrepresents its political complexion, as it is evidenced by party alignments in local legislatures or even in the House of Commons. Consequently, on particular questions, senators may misrepresent the opinion of the majority of those whom the Fathers intended to be their constituents. A notorious example of such a condition is the treatment accorded the branch lines bills for Western Canada in the session of 1924. In the House of Commons representatives from the Prairie Provinces voted solidly for the bills authorising lines in their own provinces. In the Senate, on the other hand, while some bills were not opposed, others were rejected and the rejections were supported by several western senators, notwithstanding the fact that the West overwhelmingly supported the bills. The action of the Senate was universally condemned, not only by political opponents but by the Western press of all shades of opinion.¹ Whether these senators were justified in their action or not is beside the point; the fact remains that they went directly against the evidence as to provincial and sectional opinion on the matter.

In addition to party ties there are other reasons why the Senate is not a mirror of provincial or sectional opinion. The majority of its members have had long apprenticeship in public life or in business or professional life. The horizon of the political world for such members is wider than the province or section.

¹ See quotations from various Western papers in *The Manitoba Free Press*, July 7-18, 1924.

Indeed, the Commons, because it reflects in its membership the opinions of the electorate, is much more likely to represent provincial and sectional opinion than the Senate is. In addition, the prospect of the next election is constantly before a member of the Commons. His ear, therefore, is nearer to the ground, and his eyes more closely upon the press gallery than are those of a Senator.

The desire for an upper house which will protect the provinces or the sections is a relic of pre-federation particularism, a theoretical consideration rather than a practical necessity of the present. The protection of legal rights afforded by the courts, the federal nature of the party and of the Cabinet, the representation afforded each province or section in the Commons, are surer bulwarks than any upper house could be. Indeed, the tendency towards sectional *bloes* in the lower house, as evidenced by the rise of the Progressive Party in Western Canada and the stand of Quebec on the conscription issue in 1917, gives rise to the grave question whether the forces of sectionalism are not already too powerful. Under such conditions it is, perhaps, advantageous that the Senate is not an accurate reflection of sectional or provincial opinions, and that the horizons of its members are not the provincial boundary lines of their respective provinces. Even if the Senate represented nothing but party loyalty it would be of greater utility to the Dominion than an upper house constructed strictly on provincial or sectional lines, for the very reason that the party in Canada is a nationalizing force which tends to adjust conflicting sectional and provincial interests, and to subordinate them to the national welfare.

Property Rights. Undoubtedly one of the most important functions which the Senate has come to perform has been the protection of property and personal rights. Under the British form of government, where Parliament is not prevented by any fundamental law from encroaching upon the rights of

persons or property, these rights may be endangered by changes in public policy or by private measures which grant privileges to individuals or corporations, or which seek to override the general rule of law in the interests of individuals or minorities. In Canada the House of Commons is too busy playing politics, and often too timid in refusing requests of organized minorities or powerful corporations, to provide adequate protection for these rights. While in a great many cases it has protected rights, in very many others it has passed on the duty to the Senate, or failed entirely to see that rights were being endangered. •

Some of the most insidious invasions of property rights occur in private bills for the incorporation of companies, and yet such invasions pass almost unobserved by the general public. The work of the Senate in private bill legislation is, therefore, of the utmost importance for the protection of such rights. The extent to which the Senate protects property rights is indicated by the following examples.

It has rejected or amended many bills for the incorporation of railway companies, because they proposed to give a right of way over territory for which existing companies possessed charters.¹ It has refused the request by directors, worsted in a fight with shareholders as to company policy, to overrule the decision of the shareholders by a special Act of Parliament.² It has rejected one bill to repudiate the bonds of a company,³ and another to allow a new issue of bonds to take precedence over those outstanding.⁴ It has rejected or amended many bills because the promoters

¹ *E.g.* Canada Central Ry. Co. 1880, *S.D.* 394-6; Great Eastern Ry. Co. 1882, *S.D.* 580-96; Hull Electric Ry. Co. 1896, 2nd session, *S.D.* 324-34, 381; Inverness and Victorian Ry. Co. 1891, *S.D.* 417-23; Winnipeg and Duluth Ry. Co. 1897, *S.J.* 151-2; Canada National Ry. and Transport Co. 1900, *S.D.* 743-50; *C.D.* 6607; Western Rivers Improvement Co. 1906-7, *S.D.* 364-6.

² Ottawa, Morrisburg and N.Y. Ry. and Bridge Co. 1888, *S.D.* 551-3; 1889, 378; 1890, 191.

³ Kingston and Pembroke Ry. 1897, *S.D.* 684.

⁴ Quebec Ry. Light and Power Co. 1922, *S.D.* 358-9.

had failed to comply with the rules of publication and notice, which are framed to allow all interested or opposed to appear and be heard.¹ It has rejected or amended several bills which prejudiced the rights or interests of municipalities, notably a bill to empower a railway company to erect a large levee near the City of Montreal without providing for any control thereof by the city ;² a bill to grant to a company complete water power rights over the Elbow River, which flows through part of the City of Calgary ;³ a bill which sought to allow a railway company to modify its charter so as to pass outside a town rather than through it in order that it could build up a new town-site of its own ;⁴ and a bill to override a contract between a town and a private corporation.⁵ Again, it has on several occasions rejected or amended bills for the incorporation of companies on the ground that the projects were speculative and not made in good faith, or that they did not provide sufficient security for the interests of the investing public.⁶

The Senate has also been of service in protecting national interests from invasion by private corporations. Thus it has rejected or amended bills which might lead to international complications,⁷ or which allowed too wide powers of amalgamation with foreign corporations. In one case already mentioned it has been of invaluable service. By examining a bill for the incor-

¹ *E.g.* Yarmouth Steamship Co. 1902, *S.F.* 312 ; Dominion Guarantee Co. 1908, *S.D.* 1651-2 ; Gaspé Short Line Ry. Co. 1900, *S.D.* 638-43 ; North Shore Power, Ry. and Nav. Co. 1902, *S.D.* 408 ; Northern Commercial Telegraph, 1908, *S.D.* 873.

² *St. Gabriel Levee and Ry. Co.* 1886, *S.D.* 510-653 *passim*.

³ *Elbow River Water Power Co.* 1890, *S.D.* 337.

⁴ *Calgary and Edmonton Ry. Co.* 1897, *S.D.* 467, 525.

⁵ *S.D.* 1908, 101.

⁶ *E.g.* International Construction Co. 1882, *S.D.* 463 ; Sons of England Benefit Society, 1898, *S.D.* 1003 ; Credit Foncier du Bas Canada, 1901, *S.D.* 434 ; Gaspé and Western Ry. Co. 1902, *S.D.* 248-9 ; Canada Guarantee Co. 1880, *S.D.* 188-9. See also *S.D.* 1883, 385 ; 1886, 643-4 ; 1910-11, 312, 439, 366.

⁷ *E.g.* Niagara Peninsula Bridge Company, 1882, *S.D.* 358 ; Buffalo, Fort Erie Bridge Company, 1922, *S.D.* 303.

poration of a railway company, which had passed the Commons, it discovered that a gross fraud had been perpetrated upon the Government in granting to private individuals a lease of a vast coal area in northern Alberta. An investigation by the Senate followed, as a result of which the lease was revoked and a bill passed by the Government to subordinate the granting of all future leases to the will of Parliament.¹

Property Rights and Retro-active Legislation. The Senate has also rejected or amended special bills of a retro-active character which sought to overrule judicial decisions protecting private or property rights, or to influence cases then pending before the courts. In 1919 a bill was introduced at the instance of the City of Toronto to compel an electric railway to obtain permission from the city before laying lines upon its streets. The company had obtained a charter from the federal government several years previously, which charter, through an oversight, had permitted the company to build lines on the streets or roads of the municipality without its permission. The city had contested this privilege in the courts, but had been defeated eventually before the Privy Council. The bill passed the Commons after considerable opposition from both sides of the House because of its retro-active character, and because of the doubt it would throw on the status of practically all the company's lines. The Senate, however, rejected the bill on these grounds.² In the same year a bill of much the same character was introduced at the instance of the City of Vancouver. The city had attempted by legal process to compel the destruction of a private dock without compensation, but it, too, had been defeated before the Privy Council. Accordingly, a bill was introduced into Parliament to enable the Minister of Marine and Fisheries to compel

¹ Athabasca, Grand Prairie and Fort Vermillion Ry. Co. The infamous 'Hoppe Lease.' *S.D.* 1919, *passim*.

² *S.D.* 1919, 63, 71, 936. See also *The Globe*, July 4, 8, 1919, and *The Mail and Empire* (ed.) July 9, 1919, for rather severe criticism of the Senate and attacks upon the Government for lack of good faith.

the removal at any time of any private structure erected on navigable waters, whether before or after the passing of the bill, and whether or not such structures were injurious to navigation. The Senate emasculated the bill on the grounds that it was retro-active, would interfere with vested rights, and granted altogether too broad powers to the Minister, with the result that the bill was dropped.¹ On another occasion the Senate stopped a bill which was intended to legalize a sheriff's sale, at the time a subject of litigation before the courts.²

Rights of Individuals. The Senate is, moreover, a potential check against legislation which endangers the rights and liberties of individuals by making exceptions to the general rules of law and judicial procedure. In 1917 a bill was introduced in the House of Commons to assist the provinces to enforce prohibition. It provided, among other things, for a general right of entry and search by any peace officer, should he 'believe' liquor was being held contrary to the provisions of the Act. The Senate struck out this clause, thereby subjecting enforcement to the regular procedure of information and warrant.³ However difficult and necessary the enforcement of prohibition may be, it would seem only common justice that the means of enforcement should not contravene the general principles of law which history has shown to be necessary for the protection of the liberty of the individual. In 1922 and 1924 the Senate rejected without dissent a bill of a particularly questionable character. In 1919 a wealthy citizen of Edmonton was arraigned on a charge of obtaining fraudently 'scrip' lands from 'half-breeds' some twenty years previously. Through an oversight the Statute of Limitations which limits prosecution to three years after the commission of such crimes, had not been specifically

¹ Protection Navigable Waters Bill, *S.D.* 1919, 2nd session, 223-6.

² South Shore Ry. Co., *S.D.* 1901, 522.

³ *Canadian Annual Review*, 1917, 334.

extended to the subject of 'scrip' lands. While the case was before the courts the Dominion Parliament passed a bill to remedy the defect in the Statute of Limitations, and the provincial government dropped the prosecution, though it was distinctly stated in Parliament that the bill did not affect any case then before the courts. In 1922 the local member in the federal Parliament brought in a bill to repeal the Act of 1919 in order to allow prosecution for the offences alleged to have been committed many years previously. Both sides of the House deprecated the bill, but no Party was willing to oppose it because of the votes at stake. It was pointed out that the half-breeds had, in any case, a civil remedy, and that even the passage of the bill would bring them no additional compensation for the lands which they had lost. The bill was pressed, however, and passed by the Commons. The Senate rejected it on both occasions.¹

Minorities. No less important is the position of the Senate as the protector of the rights and interests of minorities on the occasion of changes in public policy. In 1898 a bill to retire all judges of provincial courts at the age of seventy-five was brought up from the Commons. The Senate amended the bill so that it would not apply to judges then in office, but only to future appointees, on the ground that incumbents appointed for life had a vested right to their offices, or, at least, a right to compensation should they be deprived of them. The Government dropped the bill, and subsequently adopted the Senate's suggestion to provide pensions for judges retired by law.² The Senate has also on several occasions provided for the rights of property-holders when their property was suddenly rendered valueless by changes in public policy. In 1882 when the purchase for sale of railway passenger tickets by private individuals was forbidden by law, the Senate amended the measure by providing

¹ S.D. 1922, 499-501, 553-6; C.D. 1922, 3211-3220; S.D. 1924, 280.

² S.D. 1898, 1224-38, 1329-30.

that ticket-holders who had purchased the tickets for sale in good faith should be allowed to dispose of them.¹ In 1902 when the Dominion Lands Act was amended so as to allow provincial governments to expropriate lands for roadways, the Senate insisted on inserting an amendment providing for compensation to private individuals whose land was thus expropriated.² In 1914 when manufacture and sale of white sulphur matches were prohibited, the Senate softened the measure by extending the time limit for sale of matches already owned by vendors.³ In 1922 when the Canada Temperance Act was amended so as to allow a province to forbid by Order-in-Council exportation of liquor from warehouses within the province, the Senate inserted a time limit of three months before the Act should come into force in order to allow the owners of warehouses to dispose of their stock on hand.⁴ This amendment, though urged in the Commons, had been refused. In 1924 a bill passed the Commons to amend the Indian Act in order to provide that the property of an Indian dying intestate should go to his widow, if any, provided she was 'of good moral character.' This phrase was struck out by the Senate on the ground that morality had no bearing on property rights.⁵

A still more striking example of the value of the Senate in protecting minorities was its amendment to the Church Union Bill of 1924. The bill sought to enable the Presbyterian, Methodist, and Congregational Churches to unite, and provided for a vote in each local congregation of the Presbyterian Church by the ordinary method of congregational assembly. The 'Anti-Unionists' of the Presbyterian Church objected that this would not allow a complete expression of opinion, and that it was unfair to the minority. The Senate amended the bill to require that in non-concurring

¹ *S.D.* 1882, 636 ff.

² *S.D.* 1902, 449.

³ *S.J.* 1914, 240.

⁴ *S.D.* 1922, 703-13.

⁵ Indian Act Amendment Bill, *C.D.* 1924, 4692.

congregations the vote should be by ballot taken not less than two weeks or more than thirty days after the congregation first met to take action in the matter. This amendment, though offered earlier in the Commons, had been rejected there, but when the bill came back to the Commons with the amendment embodied therein it was accepted without appreciable opposition. The action of the Senate was highly satisfactory to the minority.¹

Minority Legislation. The Senate, moreover, is a check of considerable importance on legislation promoted by organized minorities. Some of this legislation is undoubtedly promoted with the best intentions and altruistic motives, such, for example, as the type of legislation known generally as 'blue laws,' yet it is questionable whether such legislation is of value unless it is supported by the opinions of the preponderant majority. This class of minority legislation we shall consider later. There is, however, a more serious type, in the class of bills urged by organized groups for their own aggrandisement at the expense of other groups or of the whole community, a class of bills which has become notorious in the United States. Against such bills the Senate is sometimes a much better check than the House of Commons.

In 1897 a bill promoted by an association of cyclists was introduced and passed through the Commons without opposition. The object of the bill was to compel railway companies to carry bicycles free of charge, and the members of the Commons feared to oppose it lest the cyclists of the country should turn out in a body to canvass against them at the following election. The Senate promptly threw out the bill.² Again, in 1914, the Government brought in a bill to compensate depositors of the defunct Farmers' Bank on the grounds that the previous Government had been negligent in renewing its charter. Scarcely a member

¹ *Manitoba Free Press*, July 15, 16, 1924.

² *S.D.* 1897, 645-9; 1900, 360.

of the lower house from Ontario dared oppose the bill because of the votes at stake in the following election. Yet, needful of relief as some of the cases were, the bill would have set a bad precedent. In the division on the bill in the Senate party lines melted and the bill was rejected by a substantial majority.¹

The foregoing incidents show that throughout Canadian history there has been considerable danger of the invasion of rights of individuals and of the security of property. The danger has not arisen because of organized attempts at revolution, or of mass movements to overthrow private property or individual rights. Canadian democracy is founded essentially on the long established principles of individualism, private property, and personal liberty. Private property is so widespread in Canada, and liberty so much the possession of all classes, that a revolution of the proletariat on the one hand, or enslavement to capitalism on the other, is an absurd fancy. The danger in the present, as in the past, rises from organized minorities or individuals seeking their selfish interests, and from majorities seeking short cuts to progress.

Were the dangers more apparent the public would be the better armed against them. But the threat to the principles of private property, individual liberty, and equality before the law, is not a general one, nor one that is present in the major issues of politics. It arises, rather, at intervals, on particular occasions and in minor issues only. Yet the danger is none the less real, if usually unobserved. A fortress may be eventually destroyed by sapping its foundations as well as by direct assault, and so may a state or any political society.

It is one of the chief functions of government to

¹ It was asserted in the Senate that the bill was promised before the election of 1911 but that the Government meant to drop it, and that Ontario members who were opposed to the Government's railway policy struck a bargain to support the Government, provided the bank depositors were assisted. *S.D.* 1914, 789. See also *The Globe*, June 9; *The Mail and Empire*, June 9. See footnote, (5), p. 113, *re* Home Bank Depositors' Relief Bill of 1925.

adjust established conditions to the changing crises of human affairs, but it is no less important that it should conserve all that has proved valuable to the welfare and progress of society. Modern constitutions have taken different means for providing for conservation of the principles of social organization evolved by social experience. One method has been to write these principles in the constitution of the state. Of this method the Constitution of the United States is the outstanding example. It puts distinct limits upon the powers granted to the Government, and provides that the limits shall be protected by the courts. The British constitution, on the other hand, provides for no legal limits upon the powers of the legislature: 'Parliament can do everything but make a woman a man, and a man a woman.'¹ The individual under the British constitution has no other protection against the power of Parliament, no guarantee that Parliament will not take away at a single stroke his whole property and all his liberty, except the political one of security based on the good faith of Parliament. This principle runs through the constitution of Canada. The Dominion Parliament or the legislature of any province is bound by no legal restriction within the field of its powers. In regard to this principle Professor Lefroy, quoting a long line of precedents, declares that there is no protection in the courts against any act of either the Dominion Parliament or provincial legislatures 'merely because it may affect injuriously private rights, or destroy vested rights, or be otherwise unjust or contrary to sound principles of legislature.' Or, as Mr. Justice Riddell declared in a famous case, 'the legislature within its jurisdiction can do everything which is not naturally impossible, and is restrained by no rule human or divine. . . . The prohibition "Thou shalt not steal" has no legal force upon the sovereign body. And there would be no necessity for compensa-

¹ See Dicey, *Law of the Constitution*, 39 ff., for full discussion of the principle of parliamentary sovereignty.

tion to be given.’¹ And, again, ‘An Act of Parliament can do no wrong, though it may do several things that look pretty odd.’²

Since the whole duty of protecting individual and minority rights from invasion by legislation devolves upon Parliament; it is of supreme importance that Parliament should perform this duty disinterestedly and thoroughly. Unfortunately the House of Commons affords no adequate protection. The business of Parliament, particularly of the House of Commons, grows yearly. The rights and interests of individuals are continually being overshadowed by the major issues of policy and party tactics. Private and minority rights are in danger of invasion through negligence or oversight, perhaps more than through deliberate intention. Private rights and the public welfare are endangered, moreover, by aggressive organized groups who represent only minorities. Canada is undergoing changes in her social organization, as are all industrialized states. Probably at no earlier period in Canadian history were economic groups, whether of capital, of labour, or of agriculture, so well organized as they are at the present time. With such groups political propaganda is an art. A small group, if it talks loudly and long enough, may convince a legislature that it is the majority of the electorate, and may bend the legislature to its will. There is, of course, less danger of this in Canada than in the United States, where parties are headless and more or less irresponsible organizations, but the influence of American methods and institutions is a continuous force in Canadian politics. Consequently, it is not at all improbable that group activities and group influence will increase rather than diminish in the future.

Of what use is the Senate under such circumstances? In the past it has canvassed dispassionately much

¹ *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd.* (1909), 18 O.L.R. 275; *v. also Kennedy, Constitution of Canada*, 427.

² *Smith v. City of London* (1909), 20 O.L.R. 133.

legislation passed in silence by the House of Commons for political reasons. More independent of group pressure than the House of Commons, it can deal more satisfactorily with legislation in the interests of selfish groups or minorities. It enjoys the leisure necessary to prune away the details of bills which conflict with private or property rights, and to adjust changes in public policy so that they bear less hardly on individuals or minorities. While the Senate is not an absolute safeguard for the protection of personal property, or minority rights, in the past it has proved a valuable one. Even aside from the possibility of reform, there is every indication that in the future the Senate will be of equal, if not of greater use as a protector of rights.

VIII

CONSERVATISM, OR OBSTRUCTION TO REFORM ?

DURING recent years the Senate has been much criticised as the enemy of social reform. Dissatisfaction has been voiced at various times by such associations as organized Labour, the United Farmers, and religious bodies, because the Senate has rejected or emasculated bills in which these organizations were interested, either from selfish or from altruistic motives. The press, too, as well as politicians on the public platform or on the floor of the House of Commons, have freely charged the Senate with unworthy motives and disregard of public opinion because it has failed to pass certain measures which, because passed by the House of Commons, were deemed to be demanded by the voice of the people.¹ So widespread is the opinion in Canada that the Senate is a synonym for obstruction to social reforms that it demands special treatment. An exhaustive analysis of the attitude of the Senate to all reform movements since federation is unnecessary. An investigation of the outstanding

¹ The following complaints are examples :

'The people's House passed a law empowering the provinces to prohibit export of liquor. The Senate stood up for the brewers and distillers and slew it. The people's House over and over again, passed a law raising the age of consent from fourteen to sixteen years of age. Surely that was asking very little. But as often as the law was passed the Senate stood by the seducers and slew it.'

'What moral legislation has the Senate not opposed? Its record has been largely one of opposition to every step in the direction of moral reform.' *Presbyterian Witness*, July 5, 1923.

incidents upon which the Senate has seemed to have opposed reform will, I think, serve to show that this opinion lacks historical perspective. I shall discuss the evidence under general topics rather than chronologically.

Criminal Law Reform.

Age of Consent. Few acts on the part of the Senate in recent years have led to more misunderstanding and criticism among reformers than its refusal to pass legislation raising the age of consent for women in cases of seduction. The ages set by the common law were formerly fourteen for all women and sixteen for women of a previously chaste character. The question of raising the age of consent has been before Parliament since 1883, when the Senate, on the motion of the Leader of the Government, rejected a private member's bill dealing with seduction and like offences. The bill was again rejected the following year on the understanding that the Government intended soon to deal with the whole subject. The government bill did not, however, affect the age of consent in cases of seduction, and a private member's bill was introduced in 1886, only to be amended in the Senate so as to retain the ages already recognised by the common law.¹

During the last decade of the century a bill was introduced several times in the Commons to raise the ages to sixteen and eighteen years respectively, but was rejected on each occasion until the session of 1897, when the Government eventually accepted the principle and brought in a bill raising the age of consent for all women to sixteen years. The Senate amended the bill to protect women of a previously chaste character from sixteen to eighteen years, but the bill died in the Commons. When the amended bill came up again in 1899, the Senate reduced the age limit to

¹ *S.D.* 1883, 256-71; 1884, 365-8; 1886, 495.

sixteen in all cases and the bill dropped.¹ In 1919 a bill was introduced to raise the age to eighteen years for all women, the Senate consenting to its passage but adding an amendment to allow a judge to instruct a jury to take into consideration the culpability of both parties. To this the Commons disagreed and the bill dropped.² The following year the bill again passed the Senate, but amended this time to protect only women from sixteen to eighteen years of age who could be proven to have been previously of a chaste character, and again the bill was dropped.³ In 1922 the Senate rejected the proposal entirely, after requesting in vain that the promoters of the bill should bring forward statistical evidence of its probable value.⁴

In general, the opposition in the Senate to the proposal has come from its lawyer members who, as usual among the legal profession, regard with considerable veneration the well-tested principles of the common law. In addition, it has been argued that to raise the age of consent would greatly increase opportunities for blackmail by unscrupulous women which would offset any advantages to be gained from the change. The Senate cannot fairly be said to have dealt with the question arbitrarily. On the contrary, both on the floor of the Chamber and in special committees, the question has been frequently discussed at length. Indeed, more time and thought have undoubtedly been given to it by the Senate than by the House of Commons.

Gambling. Again, the Senate has been accused of sponsoring race-track gambling because it refused to pass a bill brought in at the instance of Ontario to allow the province to prohibit the publication of gambling information, particularly betting-odds on racing. Its

¹ For history of the reform since 1897 see Lougheed, *S.D.* 1922, 431-3. This, however, is not very complete or accurate. See also *S.D.* 1899, 666, 718; *C.D.* 2911-30, 6397. It is significant that Davies, Mills, Fitzpatrick and Tupper (Sir Charles Hibbert), all of whom at one time or another were Ministers of Justice, and three of whom afterwards became Chief Justices of the Supreme Court of Canada, were against the bill.

² *S.D.* 1919, 931.

³ *S.D.* 1920, 696 ff.

⁴ *S.D.* 434 ff.

objections were the impossibility of enforcement by a province, and the discrimination which it would entail against provincial newspapers.¹ The bill was again defeated in the Senate in 1925.

Again in 1923 the Senate rejected an amendment to the criminal code authorizing appeals from a provincial court to the Supreme Court of Canada in cases of conflicting interpretations by courts of different provinces of the criminal code on the matter of gambling. The question arose over the case of so-called 'gum vending machines' which Alberta courts declared legal while Ontario and Quebec courts had declared them illegal. The Senate objected to the means rather than the end, and in the session of 1924 itself brought in a bill to declare the machines in question *prima facie* evidence of gambling.²

Prohibition. Although prohibition of the liquor traffic troubled the waters of federal politics within six years of federation, it was not until recently that the Senate fell foul of prohibitionists. During the period from 1873, when Parliament first discussed prohibition, to 1898, when a Dominion-wide plebiscite was held upon the question, the honours, both of opposing and supporting the issue, were divided fairly evenly between the two Houses. In 1878 the Scott Act was introduced and put into shape in the Senate,³ and in the following year, through a motion of the Senate, the Act was extended to include the Province of Manitoba within its scope.⁴ In 1880⁵ and in 1885,⁶ however, a government bill was amended by the Senate so as to exempt from the Act light wines and beers. On both occasions the amendment was rejected by the Commons. On the other hand, an amendment from the Commons to require a majority of the total electorate in any municipality voting on the Scott Act,⁷ and another to require a majority of three-

¹ *The Globe*, June 18, 1923.

² Spence, *Prohibition in Canada*, 122.

³ Spence, *ibid.* 134.

⁴ *C.D.* 1924, 4951.

⁵ *Ibid.* 133; *S.D.* 1879, 452.

⁶ *Ibid.* 137.

⁷ *Ibid.* 134.

fifths of the votes polled, were rejected by the Senate.¹ After the plebiscite of 1898 until 1916 the Dominion Parliament was little troubled with the problem of prohibition, the campaign being waged in the provincial field.

The second period of federal legislation began in 1916, when prohibition was pressed upon the Government by its own supporters as an aid to conserve food resources for the successful prosecution of the War.² As a counter move the Government brought in a measure popularly known as the Doherty Act, to prohibit importation into any province for any purpose declared by provincial law to be illegal.³ The following year the act was amended so as to include the use of the mails for liquor advertisements under the same principle of prohibition, and to grant peace officers a general right of search and seizure on the mere ground of 'reasonable suspicion' that liquor was being held for illegal purposes.⁴ The only substantial action of the Senate on these bills was to strike out the clauses regarding search and seizure and the importation of newspapers carrying liquor advertisements.⁵ Yet, even before the Senate's amendment, the bills were far from satisfactory to prohibitionists,⁶ and the action of the Senate can scarcely be said to have had any appreciable effect upon legislation which in any case was generally regarded as ineffective.

After the election of 1917 the Government put prohibition into effect by Order-in-Council under the War Time Measures Act.⁷ Subsequently in 1919 it sought legislative authority from Parliament for

¹ S.J. 1884, 254.

² Spence, *Prohibition in Canada*, 482.

³ 'The bill as finally passed was practically useless.' Spence, 483.

⁴ *The Pioneer*, August 17, 1917.

⁵ *Canadian Annual Review*, 1917, 334; *The Pioneer*, August 24, 31, 1917.

⁶ *The Pioneer* declared that the Bill even before it went to the Senate did not strengthen the prohibition laws in force in any province. (August 17.) Miss Spence, the historian of the Prohibition movement, does not even mention the bill or the Senate's amendment.

⁷ Spence, 487-8.

extending the validity of the Order-in-Council until twelve months after the declaration of peace. This proposal was rejected by the Senate, though the majority in the Senate were of the Government's party. Even a conference between the Houses failed to move the opponents of the bill, who contended that, the emergency having passed, the question of prohibition should be left to the provinces.¹ The Government apparently took a firm stand and strongly condemned the Senate for this action, yet in any case the validity of the Order-in-Council so long as a state of war continued was not affected. Within six months, before peace was declared and with little warning to enable the provinces to meet new conditions consequent upon the removal of federal restrictions on the traffic, the Government repudiated its stand and repealed the Order-in-Council.²

In 1922, 1923, and 1925, a bill was rejected which sought to enable the province of British Columbia to protect its own liquor business by prohibiting private importation by Order-in-Council of the provincial government, a method which would have enabled the province to escape the dangers and expenses of a provincial plebiscite required for the determination of the question by the amended Doherty Act of 1919.³ But the contention of the Senate that 'wet' provinces should be subjected to the same restrictions as 'dry' provinces won little favour with either side. In 1922 also a bill in the interests of Saskatchewan, enabling it to forbid exportation of liquor from warehouses established within the province, was amended by the Senate to delay enforcement for some three months so as to enable dealers to dispose of their stock in hand.⁴

¹ *S.D.* 1919. See Index, 'Intoxicating Liquor Bill.'

² See Government's Apology, *The Pioneer*, January 9, 1920.

³ *S.D.* 1922, 703-13; 1923, 1321.

⁴ *S.D.* 703-13. Amendments to this effect were opposed by the Government and voted down in the Commons, but the motion to insist on the amendment when the House of Commons objected was made by the Leader of the Government in the Senate.

There would seem to be little evidence, therefore, to prove that the Senate has hindered prohibition to any appreciable extent, much less that it has obstructed it.

Sunday Observance. On two occasions the Senate has been subjected to a storm of disapproval from moral reformers for its action in regard to Sunday observance legislation. In 1894 a private member's bill, after failing several sessions, passed the House of Commons in a badly mutilated condition. By the time it reached the Senate it contained only two clauses, one to prohibit the sale of newspapers on Sunday, which was already prohibited in most of the provinces, and the other to close canals to Sunday traffic, a prohibition already provided for by the rules of the Department of Railways and Canals. The Senate rejected the bill by a substantial majority on the grounds that it was useless.¹ In 1906, after many years of agitation on the part of reformers, the Laurier Government adopted the Sunday observance principle and brought in a bill in the House of Commons. There was much opposition to the measure in the House, largely on the grounds that it invaded provincial rights, but the moral fervour of the Government was strong enough to pilot the bill through the House without serious mishaps. In the Senate, however, many amendments were offered from both sides of the Chamber, and were accepted without demur by the Leader of the Government, among them being two which greatly weakened the force of the bill; one refusing prosecution of offenders except on the express consent of the Attorney-General of the province where the alleged offence had occurred, and the second excepting from the prohibition of Sunday amusements any forms of amusement expressly allowed by provincial law.² It is significant that both these amendments were offered by leading supporters of the Government. The Government was severely

¹ *S.D.* 1894, 565-79.

² *S.D.* 1906, 1120-58. *Mail and Empire*, July 11; *Canadian Annual Review*, 562.

criticised by the leaders of the Opposition in the Senate, who charged that the bill had been 'jockeyed to a fall.' In reply Senator Scott, the Leader of the Government, justified his course by the remark that 'the honourable gentleman knows very well this measure was pressed on us by a body of gentlemen—very excellent men—in the province of Ontario who sought to impress their views upon the federal Parliament.'¹ The amendments were not objected to by the Ministers in the Commons.² Any blame for the failure of this bill would seem to lie, therefore, not with the Senate but at the door of the government of the day.

Business Regulation. In 1889, as a result of a widespread demand, the House of Commons passed the first anti-combine legislation. The bill which sought to prohibit combinations restraining trade was amended by the Senate, through the influence of Senator Abbott, the Leader of the Government, so as to prohibit only those restraining trade 'unduly and unreasonably.'³ The member of the Commons who had promoted the bill accepted the amendment since it was late in the session, but declared that the action of the Senate had virtually destroyed the force of the bill.⁴ The following year he succeeded in getting an amendment through the Commons to strike out the words 'unduly and unreasonably,' but the proposal was rejected in the Senate, largely through the influence of Sir Frank Smith and Senator Abbott, both of whom were members of the Government. Sir Frank Smith, indeed, characterized the bill as 'claptrap' of politicians expecting an election.⁵

¹ *S.D.* 1906, 1216.

² *Mail and Empire*, July 12.

³ *S.D.* 1889, 650 ff. 'Unduly' had been proposed but rejected in the Commons, *C.D.* 1689-91. It is interesting to note that both words were read into the Sherman Act by the Supreme Court of the United States. *Standard Oil Co. v. U.S.*, 221 U.S.1.

⁴ 'The Government must certainly assume responsibility for the manner in which this bill has been handled.' *C.D.* 1691.

⁵ *S.D.* 1890, 712-54.

The next year when the bill again reached the Senate it was amended so as to protect 'lawful and useful business arrangements,' through the influence of Abbott (then Prime Minister) after a conference with the promoter of the bill.¹ This amendment was not even considered in the Commons. After the election of 1891 the enthusiasm of the Commons for the bill waned considerably. Though the amending bill was introduced again in the Senate it was not until 1897 that the House of Commons could be induced to consider the matter. In this year the bill finally passed both Houses.² In the revision of the Criminal Code in 1900, however, the Senate again insisted on inserting the word 'unduly' in the clauses referring to combinations in restraint of trade, and the House of Commons accepted it, with the result that the word 'unduly' still continues as an essential part of the Code.³ There can be little doubt that the Senate was prejudiced against the bill because of its possible interference with business. On the other hand, the indifference of the House of Commons to the movement in the Senate to compromise in the matter is sufficient proof that the enthusiasm of the House of Commons was largely a passing fancy, a fancy which indeed faded after a single election. Later anti-combine legislation has met with little opposition in the Senate. The bill of 1923, for example, though opposed by industrial and commercial interests outside Parliament,⁴ and though the Government's supporters were greatly in the minority in the Senate, was not even subjected to a division, the Opposition contenting themselves with the criticism that it was a bill to 'humbug the public' who demanded it, and by expressing their doubts of the ability or the intention of the Government to enforce the measure.⁵

¹ *S.D.* 1891, 392, 433.

² *S.D.* 1897.

³ *S.D.* 1900, 417. *Criminal Code of Canada* (Crankshaw ed.), sec. 498.

⁴ See e.g. *Industrial Canada*, June 1923, p. 646.

⁵ *S.D.* 1923, 640. See also *S.D.* 1910-11, 879-902; 1919, 925, 928.

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One instance which gave considerable colour to the charge that the Senate favours private business interests at the expense of the public well-being was its treatment of the Level Crossings Bill during the years 1906 to 1909. In 1906, after several years of agitation, a private member in the House of Commons succeeded in inducing the House to add to a government bill on the subject of railway regulation an amendment to limit the speed of trains to ten miles per hour over level, unprotected crossings, in towns or cities. The bill came to the Senate late in the session, and the clause was rejected with little debate on the grounds that it was too important a change to pass without proper consideration. The clause came up again in the following year in a special bill and, though the principle was adopted, the bill was rejected on the report of the special committee to which it was referred. In 1908 it was again brought up, and this time passed the Senate with an amendment to allow the Railway Committee of the Privy Council to except such crossings as it might see fit. The amended bill was not even considered in the Commons. The following year it was again brought up and was finally adopted in the government bill of the year which provided for compensation to assist railways in protecting level crossings.¹

The position of the Senate on the bill was misunderstood both by the Commons and by the public. While undoubtedly many Senators were opposed to the bill on the ground that it would cause great inconvenience and expense to railways, the Senate on three occasions accepted the bill in principle. There were, however, serious objections to the wording. The subject of level crossings was already under the control of the Railway Commission, and it was contended that the bill would remove this protection without providing sufficiently for an alternative. A prominent railway lawyer in the Senate, indeed, went so far as to say,

¹ *S.D.* 1906-7, 854; 1909, 81 ff.; 1909, 620-4; *S.J.* 1907-8.

'If I were a legal adviser of a railway company it would give me no concern.'¹ While it is not always safe to take at their face value statements of motive uttered in debate, there would seem to be little doubt that in this, as in many other cases, the intentions of the promoters of the bill outran fulfilment.

Labour Legislation. Another charge, not infrequently made, is that the Senate is hostile to the interests of Labour. For such a charge there is little evidence, if for no other reason than that the regulation of labour is, with a few exceptions, within the jurisdiction of the provinces, and consequently little legislation on the subject comes before the Dominion Parliament. In four instances, at least, the Senate has resisted the policies of Labour. In 1899 and 1900 it struck out a clause to exempt trade unions from the Anti-Combines Act in a government bill amending the Criminal Code. The second year, on the objection of the House of Commons, it withdrew its opposition.² On three occasions it rejected a bill to empower Trade Unions to use Union labels on goods made in 'unionized' industries or shops, on the ground that the bill was not supported by public opinion and that it was monopolistic in character.³ Nor does there seem to have been any demand for the bill except from certain Trade Unions. In 1910-11 it 'shelved' a private member's bill to establish the eight-hour day in public works, for the reason that the regulation of hours of labour was a provincial concern, and that, even on public works conducted or contracted for by the federal government, or under contract, provincial custom or law should be followed.⁴ It is worthy of note that this principle still governs hours of labour on federal public works.⁵ In the same session a second private member's bill, the object of which was to require railways to pay their employees fortnightly, was also rejected on the grounds that it

¹ S.D. 1909, 75.

² S.D. 1900, 429, 603, 655, 1185.

³ S.D. 1898, 665, 739-42; v. also S.D. 1899, 1905.

⁴ S.D. 1910-11, 439-625, *passim*.

⁵ *Labour Gazette*, May 1919, 598.

would cause unnecessary inconvenience and hardship to railway companies without being of great advantage to employees.¹ Subsequently, however, on the appointment of Senator Robertson, a prominent official from the ranks of organized Labour, the Senate was induced to pass the bill in a single session on being shown that it was needed in order to equalize conditions between employees and railway companies.² Again in 1923 and 1924 the Senate killed a bill for the amendment of the Lemieux Act, which provides for the settlement of disputes between employers and employees by conciliation. The Act provided for the appointment of one member to the Board of Conciliation by each party to the dispute, and for the appointment of the third by agreement between the two members already appointed, and, should they fail to agree, by the federal Minister of Labour. The Senate insisted on amending this last clause so as to provide for the appointment by the Chief Justice of the province where the dispute had occurred, on the grounds that the Minister of Labour might himself be a trades union official or a capitalist, and therefore sympathetic to either side and likely to appoint a prejudiced member to the Board. On both occasions the Government protested that this method would cause unnecessary delay, and, since the Senate insisted on its amendment, the bill was dropped. The amendment of the Senate was no doubt influenced by the fact that the then Minister of Labour had formerly been a trades union official, but its action did not in any case affect the working of the Act, which still continued to operate under the old plan.³

Public Ownership. Finally, it has been widely asserted in recent years that the Senate is the foe of public ownership of railways. As is the case with most charges of this nature this assertion is founded on opinion rather than evidence. It is based largely

¹ *S.D.* 1910-11, 657 ff.

² *S.D.* 1917, 223.

³ *Industrial Canada*, August 1924, 48. v. also *S.D.* 1924, 448, 790. *C.D.* 1924, 4357-63.

on the Senate's treatment of the Branch Lines Bills of 1923 and 1924, and on charges made by certain senators during the session of 1924 against the management of the National Railways. I have considered the Branch Lines Bills in an earlier chapter, and I pointed out there that in the case of each rejected or amended bill there would seem to have been reasonable grounds, quite apart from either partisan motives or hostility to the principle of public ownership.¹ The insistence of the Senate that each branch line should promise an early return for the capital invested can scarcely be held to furnish evidence of antagonism to public ownership. There are, of course, various theories of public ownership, but the principle advocated by the majority of the Senate, that the National Railways should be operated on a business basis, would clearly seem to be a reasonable one, especially in view of the enormous deficits in interest charges on capital investment which the Dominion must meet yearly.

Conclusions. These instances have been selected, as was intimated earlier in the chapter, as evidence against the Senate. They do not include all occasions upon which the Senate has opposed legislation for social changes, particularly occasions upon which it has reversed its position after a single session,² but they do, it is believed, include most important instances, and especially those in which the Senate's opposition has continued. No mention has been made of reforms which the Senate has accepted without question, or of reforms advocated by senators. Of this latter class many bills for reform have passed the Senate and failed to pass the Commons, just as reform bills from the Commons have failed in the Senate. For example, during the four sessions 1912-1915, seven bills, having to do with reform of Criminal Law and Procedure, and with the regulation of business, passed the Senate and failed to go beyond the first reading stage in the

¹ See Chap. VI.

² *E.g.* Marriage with Deceased Wife's Sister Bill, 1880, 1881.

Commons. Consequently we are warranted in reaching some general conclusions as to the relation of the Senate to social reform.

As was found in the case of government legislation of the ordinary type, the Senate has never opposed bills for social reform for which there was a clear public demand. The mere fact that a bill has passed the House of Commons once or even several times is no proof that it is demanded by the people as a whole or by the House itself. Sometimes a Government adopts a reform which a private member has advocated for years, not because it is converted to the necessity of the reform, but because it is expedient to placate a follower. At other times reform bills advocated by a vocal minority of the electorate, either from selfish or altruistic motives, are passed over by the House of Commons with little discussion because of the votes at stake. Such bills misrepresent, rather than represent, the collective opinions alike of the House and of the electorate. Hence the Senate in opposing reforms already accepted by the House of Commons may be actually carrying out its wishes. Such instances as the Combines Act of 1889 and the Lord's Day Act of 1906 furnish good grounds for believing that the House of Commons and the government of the day have not always been averse to deceiving the public by accepting bills and then influencing the Senate to reject or emasculate them. At other times, as in the case of the Scrip Frauds Repeal Bill of 1922 and 1924, mentioned in a previous chapter, the existence of the Senate has been at least an excuse for the House to shirk the responsibility of rejecting so-called reform legislation which the majority were convinced was unsound.¹

¹ See Chap. VII.

'I would like to say before the Committee adjourns that there is too much of a disposition on the part of the House of Commons to save its face by putting through this sort of legislation expecting us to deal with it. The other House simply passes it on to us in order that we shall kill it. It is what is described as "passing the buck," and I cannot say I think it right or proper.' Sir James Loughheed on bill to prohibit publication of gambling information, *The Globe*, June 18, 1923.

It must, however, be admitted that a general public demand, whether expressed outside, or within the House of Commons, is not a test which can be fairly applied to all reform legislation. Many proposed reforms are neither desired nor understood by the general public because it is likely to be affected only in a very remote and indirect way. Yet frequently these reforms are necessary or advantageous. Whatever ultimate tests must be applied to proposed reforms of this character, the primary one would seem to be that they should obtain due consideration and a fair hearing before a legislature. Bills of this character ordinarily receive much more consideration at the hands of the Senate than of the House of Commons, if for no other reason than that the Senate has more time at its disposal. It is rare, indeed, that any bill which comes up from the House of Commons does not reach the second reading stage, where its principle is debated. In the House of Commons, on the other hand, it is seldom that public bills which have already passed the Senate, or public bills introduced by private members, go beyond the first reading, which is a purely formal stage. In addition, most bills for social reform are referred in the Senate to special or standing committees to allow exponents and opponents from outside to appear and be heard. Occasionally it does happen that a bill is referred to a committee as a convenient means of disposing of it silently, but the number of bills which 'die in committee' in the Senate is quite as small as, if not smaller than, it is in the House of Commons.

Finally, although on occasion the Senate may have made mistakes, it cannot be said to have opposed reforms which were clearly necessary or advantageous. In regard to such bills as it has opposed there has been sufficient evidence on both sides to warrant reasonable doubt. The Senate has clearly shown that it is amenable to proof even on bills to which it was in the first instance opposed. If it has at times looked more

sympathetically upon the existing law than upon proposed changes is this necessarily an evil ? Caution in regard to changing the rules which regulate the complicated relations of society can scarcely be called a defect in government.

IX

THE APPOINTING SYSTEM

‘THE Senate,’ said Goldwin Smith, ‘is a bribery fund in the hands of the Government, and paddock for the “Old Wheel Horse” of the party, nor, on its present footing, will it ever be anything else; . . . A Minister cannot help himself; the goods, in the shape of party services and expenditures on elections have been delivered, and he is compelled to pay.’¹

‘From the first,’ writes Professor Wrong, ‘appointments to the Senate came under the mechanism of the party. . . . The security of the position for life and the freedom from the labours of an election have made a Senatorship a desirable crown for party service, and to this use the office has been put. . . . No government, Liberal or Conservative, has made any serious effort to save the post of Senator as a reward for any other kind of public service, and in the present condition of political thought it would be quixotic to expect that anything but party interests should be considered.’²

‘Liberals and Conservatives combined,’ declares Professor Stephen Leacock, ‘we made our Senate, not a superior council of the nation, but a refuge of place-hunting politicians and a reward for partisan adherence.’³

¹ *The Bystander* (Toronto), 1883, 23.

² *New Statesman* (London), February 7, 1914.

³ *National Review* (London), July, 1913.

‘The Senate is a Magdalen asylum for political prostitutes and broken down politicians retained by the Government.’ Hon. David Mills in a

Such statements are, on the whole, true. Party appointment is an all but unbroken tradition. During his nineteen years of office Sir John Macdonald appointed only one Liberal and one Independent;¹ Sir Wilfrid Laurier appointed none but Liberals; and, except during the period of Union Government, Sir Robert Borden appointed none but Conservatives. Yet the blame cannot all be laid on a Prime Minister; the party always demands its pound of flesh, and the public consents to payment. One has but to glance at the massive folios of applications for senatorships and other appointments in the correspondence of Sir John A. Macdonald, and to the number of appointments made immediately before and after general elections, to realize the pressure there is upon a Prime Minister. 'Does the right honourable gentleman say that under our present constitution he feels he must select appointees of his own party when choosing them?' asked a member of Sir Wilfrid Laurier. 'I do not say,' was his reply, 'that I must select, but I do say . . . that when I have come to the moment of selection, if I have to select between a Tory and a Liberal, I feel I can serve the country better by appointing a Liberal than a Conservative, and I am very much afraid that any man who occupies the position I occupy to-day will feel the same way, and that so long as the appointing is as it is to-day in the hands practically of the First Minister, I am afraid we stand little chance of reform.'² Such a condition is the result, not of weakness or irresponsibility on the part of a Prime Minister, but of the whole system of appointment, which the public expects to be exercised under the aegis of the party. Political morality in Canada demands nothing better and it receives its just deserts.

debate on Senate reform (quoted *S.D.* 1898, 61). Mills subsequently became a senator and then, of course, was converted from this erroneous view.

¹ John Macdonald of Toronto (Lib.); Donald McInnes (B.C.) (Indep.). *S.D.* 1890, 553.

² *C.D.* 1906, 2304.

But tradition goes even farther. The first claims upon a Prime Minister in making appointments to the Senate are those for services already rendered rather than for services to be performed by party support in the upper house. Too often senatorships have been granted as pensions to the 'deserving poor' among the party supporters in the House of Commons and provincial legislatures, and as honours to editors of the faithful press, party organizers, or contributors to the 'war chest.' Yet the very same criticisms may be applied to almost any other class of appointments over which a Prime Minister has supervision. The 'spoils system' applies to all. The Bench has always been a graceful means of retreat for Cabinet Ministers learned in the law, and for members of the Commons who have wearied of party strife or failed to work well in party harness. Indeed, the last three Chief Justices of Canada have been former Cabinet Ministers. Members of the legal profession in the Commons who have been sufficiently 'public spirited' to resign their seats in favour of Cabinet Ministers without seats have frequently chosen the Bench as their reward.¹ Even the 'rejected of the people' have found places in the public service as members of permanent boards or commissions.² Equally with senatorships, lieutenant-governorships and royal honours have been the reward for eminent party service.

Why, then, has the system met with such criticism in regard to the Senate while it is taken as a matter of course in regard to other offices? While it is possible that more care has been taken in other appointments because self-interest compels a Government

¹ 'Every hon. member knows that it has been the custom and tradition in both political parties when an hon. member makes way for a Cabinet Minister to recognize the public spirit of that member by appointment to the Senate or the Bench, or to some other suitable public position.' Hon. N. W. Rowell, *C.D.* 1920, 257-8.

² For example, Sir William Hearst, former Premier of Ontario, was appointed to the International Joint Commission after the defeat of his Government at the polls in 1919.

to maintain a fair degree of efficiency in administration, this is not the primary reason. It is rather that senators are called upon to deal with political and not legal or administrative questions. In the passage of a bill demanded or opposed by a portion of the electorate some public interest is always aroused, but rarely is this so in regard to judicial decisions or administrative routine, unless gross and palpable incompetence appears. Thus, while other appointees withdraw from the political stage, senators remain as understudies.

Yet, granting the partisan nature of appointments, the system has not been without certain useful results, not the least of which has been the opportunity it has offered to a Prime Minister to strengthen his Cabinet. This has been done principally in the four following ways :

(1) A Prime Minister has been able to maintain the principle of federal or sectional representation in his Cabinet without weakening seriously the quality of its membership. It frequently happens that there is not among the elected representatives of a particular section or province a member of cabinet rank and a Prime Minister wishes to bring in someone not in Parliament, perhaps a Provincial Prime Minister, to represent his province in the Cabinet. In such cases two courses are open. He may appoint the Minister to the Senate if there is a vacancy, or he may induce a member of the Commons who holds a 'safe' seat to resign on the understanding and perhaps even on the promise that he shall be appointed subsequently to the Senate or to some other office. Thus, in 1917, when the Union Government found themselves with only three supporters out of a total of sixty-five members from Quebec, the Postmaster-General, Mr. Blondin, who was among the defeated candidates, was appointed to the Senate and allowed to retain his portfolio in order that he might represent Quebec in the Cabinet.¹ If, however, a Minister can be reasonably sure of winning a by-election in his province, the

¹ *Canadian Annual Review*, 1918, 435.

more usual practice is to 'open' a seat for him in the Commons. Occasionally, too, a prominent member of the Senate has been appointed to represent in the Cabinet his province or section, but such a course is not popular and is now rarely followed.¹

(2) The system of appointment has been a means of bringing into the Cabinet able men not members of Parliament, and, perhaps, without previous parliamentary experience. Thus, under the Union Government a seat was 'opened' in the Commons for an able financier, Sir Thomas White, as Minister of Finance, the member who resigned in his favour being subsequently appointed to the Senate.² Under the same Government Mr. Gideon Robertson, a prominent leader of organized Labour, was appointed to the Senate and subsequently made Minister of Labour.³ In this case, not only were Mr. Robertson's abilities and experience put at the service of the Government, but organized Labour was given a representative in the Cabinet when it would have been extremely difficult for it to get a representative elected to the House of Commons. Similarly, during the Macdonald régime, Sir Frank Smith, an able business man from Ontario and an Irish Roman Catholic, was appointed to the Senate and given a place in the Cabinet, not only because of his usefulness to the Government as a business man but as the representative of the Roman Catholics of Ontario.⁴ Because he was a Roman Catholic Conservative he would have found great difficulty in winning in Protestant Ontario a seat in the House of Commons.

¹ *E.g.* Sir James Lougheed was made Minister of Soldiers' Civil Re-establishment in the Union Government. The objection to appointing a senator to represent a section was, however, early apparent. 'This is I think clear—if you can safely open a seat in the Commons it is better to appoint a man from that House. . . . The enemy would not be able to triumph over us as they will have fair occasion to do if we are driven to appoint a senator.' Campbell to Macdonald, December 22, 1872, *Macdonald Correspondence*, viii. 539 (Dominion Archives, Ottawa).

² *C.D.* 1920, 257-8.

³ *Canadian Annual Review*, 1918.

⁴ *S.D.* 1886, 517 ff.

(3) The Senate has been a useful means of securing or retaining the services of Ministers of advanced age whose assistance was still valuable and who gave added prestige to the Ministry. Thus, in 1898, Sir Oliver Mowat was appointed Minister of Justice in the first Laurier Ministry and given a seat in the Senate at his own request, because he feared the rigours of an election campaign.¹ Sir Oliver's presence in the Cabinet undoubtedly added greatly to the prestige and popularity of the new Government. Sir Richard Cartwright was appointed to the Senate before the election of 1905 and Sir George Foster before the election of 1921. Both men were old campaigners, men of national reputation who had held many offices with great distinction, and whose services as Cabinet Ministers were still of great advantage to the Government and the Dominion, but both were advanced in age and scarcely able physically to go through the turmoil of another election.

(4) Lastly, the Senate has been a convenient means of getting rid of 'dead timber,' or of difficult material from both the Cabinet and the House of Commons. This last is the least defensible use, yet it is a constant temptation to a Prime Minister. Cabinet Ministers are sometimes more easily taken in than turned out, and a senatorship has sometimes been a sugar plum to soothe wounded feelings. So also it has been a bribe to prominent members of the House of Commons who have shown too much independence for good party discipline. It has been charged also that Prime Ministers have kept vacant senatorships dangling for months before the eyes of party supporters in order to maintain discipline.² 'My dear P——,' wrote Sir

¹ Biggar, *Life of Sir Oliver Mowat*, ii. 647-8.

² 'While the power to appoint members of the Senate remains in the hands of the Government, it is a weapon by which they can use undue influence over the members of the House of Commons. . . . Why do they not fill the vacancies in Nova Scotia and New Brunswick? It is because the appointments are dangling before the eyes of certain people to give the Government power.' Senator Perley, *S.D.* 1906, 824-6.

John A. Macdonald to a local party manager, 'I want you, before we take any steps about J. Y——'s appointment to see about the selection of our candidate for West Montreal. From all I can learn W. W—— will run the best. He will very likely object ; but if he is the best man you can easily hint to him that if he runs for West Montreal and carries it, we will consider that he has a claim to an early seat in the Senate. This is the great object of his ambition.'¹ This indicates the use to which at times appointments have undoubtedly been put.

Of considerable importance also is the opportunity the system of appointment has offered of giving representation to minorities. Political parties in Canada, as in the United States, have been nationalizing agencies which have sought to attract to their folds people of all sects, all races, and all classes within the Dominion. Where they have failed to do so by arguments and policies, they have attempted, when in office, to win support by a judicious use of the spoils system, and the Senate has been a ready means to this end. Thus, the Macdonald Government, whose strongest supporters in Ontario were the members of the Orange Order, attempted to conciliate the opponents of that Order, the Roman Catholics, by giving them a greater number of representatives in the Senate than their actual numbers in proportion to the Protestants in the province warranted. It was extremely difficult, at the time, for Roman Catholics in Ontario to obtain nomination as Conservative candidates for the House of Commons. A similar precedent has grown up in regard to the Protestants of Quebec, and to-day both minorities enjoy proportionately greater representation in the Senate than in the House of Commons.² Similarly, Senators have been appointed as the avowed representatives of the French in Ontario,³ of the

¹ Goldwin Smith, *Canada and the Canadian Question*, 168.

² *C.D.* 1914, 5295. *S.D.* 1906, 469.

³ Senator Casgrain, *S.D.* 1887, 11.

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Germans in Ontario,¹ of the French in Western Canada,² and of the Acadians of the Maritime Provinces.³ Indeed, the appointment of representatives for religious and racial minorities has become such a tradition that a Prime Minister would find great difficulty in ignoring it. Moreover, the appointment of Senator Robertson as the representative of organized Labour will undoubtedly be treated as a precedent, and, even without reform, the Senate may become a means of representing economic as well as racial and religious groups.

The question may, of course, be asked whether such representation is of any value either to the minorities themselves or to the political life of the Dominion, or whether it is merely a sop to win support which could not otherwise be obtained. It must be admitted that such appointees are primarily supporters of the party, and only secondarily representatives of their respective minorities. Yet it may be said fairly, I think, that individual members of the Senate have quite as much influence, either in amending legislation or in the councils of the party, as the average members of the House of Commons. Most senators are men of substance and at least of considerable local importance, and many have close personal contact with Ministers and party leaders. That their influence in the Senate may be of use is well illustrated by the work of Senator Robertson, who was able to put through the Senate in a single session a bill to require railway companies to pay their employees fortnightly. This bill had been thrown out regularly during several previous sessions.⁴ Minority representation in the Senate has certainly some influence, perhaps quite as much as if the representatives were in the Commons.

Finally, the Senate has given to business interests a representation which they were without in the Commons.

¹ Senator Ratz.

² Senator Coté, appointed 1924 to succeed Senator Forget as representative of the French from the West.

³ Senator Poirier, New Brunswick, appointed 1885.

⁴ See *ante*, pp. 167-8.

Among its members have always been numbered a few at least who have been highly successful bankers or financiers, merchants or manufacturers, newspaper proprietors or lawyers, and who have been widely known and highly respected in their particular fields of labour.¹ Membership in the Senate has enabled such men to combine business and politics; long membership in the Commons, on the other hand, has rarely been combined with a successful business or professional career because of the long sessions required at Ottawa and because of the arduous election campaigns entailed. This difficulty of combining business and politics is to some extent the reason why successful business men fail to make a success of politics in the Commons and so readily accept seats in the Senate. Frequently, too, they enter Parliament too late in life to win honours in the rough-and-tumble of the Commons. The Senate is, therefore, their logical place in Parliament.

A frequent criticism of the Senate is that it has been composed of mediocrities. Porritt asserts that during the first half century of its existence not more than five of its entire membership were men of national fame, while 'not more than ten were of front rank in Dominion politics, or were men who, after Confederation, earned for themselves even mention in the political history of Canada.'² Professor Wrong declares that the average Canadian would be puzzled were he asked to draw up a list of half a dozen senators.³ A recent writer speaks of 'The poor quality of men who were

¹ The Senate has for this reason frequently been charged by organized labour and organized farmers as the house of the vested interests. Sir George Ross declared that if a balance were struck between the wealth controlled by individual members of the Senate and individual members of the Commons the result would be largely in favour of the Senate. *S.D.* 1908, 759.

² Porritt, *Evolution of the Dominion of Canada*, 290. The five of national fame—George Brown, Sir Mackenzie Bowell, Sir John Abbott, Sir Oliver Mowat, Sir Richard Cartwright. To these we might add a sixth, Sir George Foster, who was appointed in 1921.

³ Wrong, *New Statesman* (London) February 7, 1914.

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appointed . . . violent partisans, men whose minds have become warped and twisted with long controversy . . . those who were not of sufficient merit to get into the House of Commons, or having got there, were unable to hold their seats.'¹

While there is some truth in such criticisms, they ignore the principle which governs the British form of parliamentary government, that the lower house is necessarily the primary chamber. Political reputations are not made in the Senate for the simple reason that it is a secondary chamber and neither makes nor controls policy. It is a fair question whether Sir John Macdonald or Sir Wilfrid Laurier, had they been members of the Senate rather than of the House of Commons, would have attained the position of national figures, or even secured honourable mention in the gallery of history. Place and a happy combination of circumstances, as well as individual ability, are required to win political fame. Political honours have not been won in the Senate, not because its members lacked ability but because under the Canadian form of government the House of Commons is the only arena where the highest prizes are offered.

Although it is granted that the Senate has been composed of all too few men of Cabinet rank, and all too many party 'back-benchers,' and that the reward of a promotion to the upper house has been too often for faithful rather than for distinguished party service, the Senate has always numbered among its members at least a few outstanding personalities. Among those best known in past years were: George Brown, Sir

¹ Dawson, *The Principle of Official Independence*, 247-8.

But there are opinions to the contrary. 'Indeed even for the most censorious it would be a difficult task to show that, speaking generally, appointments could have been better. The senators have been capable and incorruptible men, chosen generally because conversant with public life, experienced in legislation, and of high standing in the community in which their lives have been spent.' H. M. Mowat, *Queens' Quarterly*, July 1907, 42. See also Holland, *Canadian Magazine*, 1911, vol. xxxvii, 157, and Hannay, A. B., *McLean's Magazine*, December 1914. See also *S.D.* 1896, 20 ff.

Alexander Campbell, Sir Mackenzie Bowell, Sir John Abbott, Sir Oliver Mowat, Sir Richard Scott, Sir Richard Cartwright, Sir George Ross. At the present time the Senate undoubtedly includes some of the ablest men in Parliament. A survey of the debates of the Senate and observation from the gallery impress one with the influence which a senator with business ability or with political talent exercises over his fellow-members. The permanent character of its membership and its small size in comparison with the House of Commons tend to encourage personal contacts between members. Every senator is, as a rule, known personally to every other senator. Hence, the possibilities of the influence upon the Senate of a strong personality are numerous. One good appointment to the Senate, therefore, redeems many poor ones.

TABLE I.¹ SENATORS WITH PREVIOUS EXPERIENCE IN PUBLIC LIFE.

	1889.	1901.	1909.	1920.
In the Commons - - - -	20	40	41	36
In Provincial Legislatures - -	23	21	23	17
In both House of Commons and Provincial Legislatures - -	7	13	15	6
Ex-Prime Ministers - - -	4	2	3	0
² Ex-Ministers of Dominion - -	5	5	5	0
Ex-Ministers of Provinces - -	11	13	7	6
Ex-Provincial Party Leaders - -	0	1	1	3
Speakers of Dominion Senate or House of Commons - - -	4	2	4	4
Speakers of Provincial Legislatures	5	3	2	3
Lieutenant-Governors of Provinces	0	3	1	1
Other Public Officials - - -	4	2	1	3
Local Government Mayors or Reeves - - - -	12	8	8	17
Local Government Aldermen, Wardens, etc. - - - -	9	9	6	8
No Experience except Local Government - - - -	0	22	23	27

¹ Compiled from *The Parliamentary Guide*. The *Guide*, however, frequently omits important details. The table errs very probably in minimizing the numbers of experienced members, and certainly does not magnify them.

² In 1924 there were ten ex-Ministers of the Dominion in the Senate.

While the criticism that the Senate has been recruited for the most part from party supporters in the Commons rests on substantial foundation, the result is not entirely to be deplored. It has the outstanding merit of conserving experienced legislators. The extent to which this occurs is borne out by the table on the previous page. The hostile critic will undoubtedly find in the table much evidence for the usual criticism that the Senate is composed of 'worn-out politicians' and 'party hacks.' A careful examination of attendance lists, of divisions, of committee records, and of the indices of the debates, will, I think, convince all but the wilfully blind that it is this class who do the great bulk of the work of the Senate rather than the journalists or business men who enter the Senate without previous legislative experience. This latter class, entering late in life with little technical knowledge of the processes of legislation or of the existing law, are more inclined to take their appointments as 'honours,' and to attend and take part only when bills or subjects in which they have a special interest are before the House.

Criticism of the membership of the Senate, to be satisfactory, must take into account the kind of work which it is called upon to do. On a quantitative basis, the bulk of its work is the revision of legislation which comes up from the House of Commons. In such work it is not called upon to select the problems to be solved nor the means to be used; its duty is, rather, to assist in shaping the means with which it is provided to the end desired. For this 'labour of the file' the qualities demanded are chiefly those gleaned from experience as legislators, such as a knowledge of the technique of draftsmanship, familiarity with the existing law, acquaintance with the principles of administration, and general knowledge of the problems to be faced.

The necessity for an upper house, composed for the most part of experienced legislators, becomes the more apparent when we consider the fluctuating membership

of the House of Commons. For example, out of a total of 235, the election of 1921 brought in 113 new members who had no experience even in a provincial legislature, 54 members who had served one term in Parliament, and only 48 members who had served longer. While this 'turn-over' was inordinately large because of the rise of the Progressive Party, at every election many members of the House of Commons fall out. Such changes may be necessary to meet changes in public opinion, but they make for poor legislation. The extent to which the Senate conserves experience is borne out by the table given above which classifies members according to experience in public life.

Moreover, it is a fair question whether an upper house ought to be an assembly of notables. It is a common assumption, but a questionable one, that eminent professors, scientists and authors ought to gravitate towards an upper chamber equally with successful business men and politicians. Yet does a knowledge of the intricacies of the atom or the ability to write learned books constitute a passport to a political assembly? Italy's Senate is founded on that principle but appears to have no more political influence, and has certainly less real power, than has the Senate of Canada.¹ Probably no other upper chamber in the world has in its membership so many expert administrators and legislators, or so many eminent financiers, journalists, scientists, and men of letters as has the British House of Lords, yet the House of Lords is a weak body.² The assumption that an upper chamber

¹ Ogg, *Governments of Europe* (ed. 1913), 373.

² 'The debates in the House of Lords are not only models of grave discussion. In them is also often displayed to a remarkable degree matured statesmanship and administrative experience. Some of the highest living authorities on many subjects are usually to be found in the House of Lords. Archbishop Magee remarked that nothing struck him more in the House of Lords than the large amount of special knowledge it possessed. No matter how generally little known the subject of discussion might be, he said, some obscure peer was certain to rise on a back bench and show that he had made a particular study of it. . . . In it are numbers of men who have

should be composed of notables resembles closely the common fallacy of democracy that every man is a potential governor. Were the Senate an assembly of university presidents, railway builders, merchant princes, financiers and labour leaders, the position of senator might entail more honour, but it is extremely doubtful whether the House itself would have more power or political influence than it has to-day. What is required in the membership of an upper chamber, when the lower makes and unmakes governments and controls the purse and public policy, is not so much eminence as qualities which make for good legislation—familiarity with the nation's problems in general and in detail, and a sufficient degree of independence to face the waves of popular prejudice which frequently affect the lower house. In a word, it is to compensate for the weaknesses of the membership of the lower house, which are the weaknesses of democracy itself—lack of special training, provincialism, and prejudice.

But public life alone is hardly sufficient to give legislators the knowledge to deal intelligently with the problems which they are called upon to solve. It seems at least necessary that the individual members of any legislative assembly should bring to its discussions of public questions a knowledge and experience gained by participation as private citizens in the various activities of the country's life. That the Senate does actually represent quite as wide variety of experience as the House of Commons is shown by the following table, giving the classification of the membership of the two Houses at various periods according to occupation or profession, although more senators than members of the Commons have retired from active participation in business or professional life.

distinguished themselves in the most varied capacities—merchants, manufacturers, lawyers, soldiers, bankers, journalists, civil servants, administrators of distant parts of the Empire, who have all been promoted to the peerage for their success in business, for their practical experience of affairs, or for their services to the State.' MacDonagh, *The Pageant of Parliament*, ii. 65.

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TABLE II.¹ OCCUPATIONS OF SENATORS AND M.P.'s.

	1889. S. H. of C.		1901. S. H. of C.		1909. S. H. of C.		1920. S. H. of C.	
Finance and Banking -	11	12	8	5	10	6	12	11
Merchants - - -	15	36	12	44	12	38	17	26
Manufacturing - -	8	16	6	16	8	21	9	23
Agriculture - - -	4	28	6	25	12	21	10	35
Fishing and Shipping -	2	9	4	2	2	1	1	2
Engineering and Mining	2	8	3	4	2	3	2	4
Medicine - . - -	8	17	6	15	8	24	6	24
Law - - - -	12	60	15	61	12	78	19	74
Education - - -	4	5	2	2	4	2	1	1
Press and Journalism -	2	10	3	10	6	10	7	13
Labour - - - -	—	—	—	2	—	2	1	1
Unclassified - - -	7	14	12	11	9	10	7	13
Total - - - -	76	215	77	200	85	216	94	230

* While it must be admitted that the great majority of the senators do not represent the top of their professions, there are many exceptions, particularly among the business men and lawyers, many of whom have climbed well up on the ladder of success and represent at least a high average of mediocrity. And who will

¹ Compiled from *The Parliamentary Guide*. It is sometimes very difficult to classify an individual who is probably engaged in several businesses or occupations at the same time, but I have endeavoured to assign any such individual to the business or profession in which he had a major interest, with the exception of those classed under 'Education,' who in the majority of cases were also practising lawyers or doctors. See Sir George Ross, *S.D.* 1908, 110-11, for classification in 1908, as compared with the American Senate.

say more for the House of Commons? Indeed, if there is one word which characterizes the membership of all legislative assemblies in Canada, that word is 'mediocrity.' The Senate's membership probably represents a higher average of individual success than does that of any other Canadian legislative chamber.

But the most serious objection to the system of appointment is that it has failed to give to the members of the Senate the character of independence of party ties. As to private legislation the system has been, on the whole, successful. As we have seen, the Senate has generally amended and rejected private bills without fear or favour. With regard to that class of bills which are pressed upon every representative assembly by aggressive minorities or members anxious to curry favour with the electorate, such as 'moral' legislation, the Senate has been a sound, conservative institution, unafraid to reject bills which are unsound in principle or which the public has not clearly demanded, yet not obstructive when the public will has been evident. On party questions, however, the results have been more mixed. An examination of the division lists from 1911 to 1923 shows that out of a total of forty-nine divisions on party questions there was an average of 6.4 'bolters' from party lines, and an average of 12 credited with attendance for the days on which the divisions took place who did not vote. This is an evidence of some independence, and is certainly a higher percentage than is found in divisions on the same questions in the Commons. Yet, as I have pointed out, while subsequent events have upheld the Senate in nearly every bill that it has rejected when it was not in political harmony with the Commons, the Senate must be condemned for accepting several bills when the majorities were of the same party in both Houses. Nor is there any evidence of its defeating on such occasions bills which were of great political importance and were demanded by the government of the day. Indeed, as I have said, the

Senate has shown its independence and justified its existence as a checking chamber in the matter of government legislation only when its majority was politically opposed to the majority of the Commons. At other times it has been merely a revising chamber.

This lack of independence is not difficult to explain. Members are rarely appointed under fifty years of age and are usually older, and their political opinions are already crystallized and their party loyalty deeply ingrained. Moreover, former members of the Commons who have been rescued from political oblivion, or who have been saved from defeat at the polls, and given a pension for life and membership in a luxurious club amid interesting surroundings by the kind hand of a Prime Minister, are only human if they show loyalty and gratitude when they have opportunity. Moreover, there are still a few means of discipline; there are still a few bribes to offer in the way of the Speakership of the Senate, judgeships, Lieutenant-governorships, and occasionally a seat in the Cabinet. 'Can T—— not rid us of W——?' wrote a leader of the government forces in the Senate to Sir John A. Macdonald concerning a Speaker who 'spent his time with the Grits.'¹ And of another member who was influential and independent, though nominally a government supporter: 'I hope you will find that we can give M—— the judgeship in Manitoba, not as you think, that he gives me trouble, I have always managed to keep him right . . . but because he has fairly earned consideration at our hands and that he might at any time prove exceedingly troublesome to us at some moment when we desired some measure or other to pass the Senate. I have to consider my "weather possibilities" in the Senate, of course.'²

This lack of independence senators themselves have at times not denied. 'Let us admit the whole

¹ Campbell to Macdonald, *Macdonald Correspondence*, ix. 53.

² *Ibid.* 522.

truth,' said a senator after twenty years' experience in the Senate; 'it may be hard, it may be humiliating, but the fact is that we can, in many instances, be forced, that we can be persuaded, to vote a certain way. It is logical. If I appoint an agent, if I give a commission to a man, I have a right to have that man look to me for instructions. If I wish him to do a certain thing I have a right to see that he shall look to me before taking certain steps. We are appointees of the government and not of the province, and the government has a right to see that we vote a certain way, and they do see to it, too.'¹ Such a statement made in the heat of a debate may be discounted to some extent, yet the evidence is that it is based on fact. This is a serious charge against the system.²

The Fathers hoped that life appointments would be a means of securing the independence of the members of the Senate, but their hopes have been only partly fulfilled. The experience of New Zealand would go to show that life tenure makes for greater independence than does appointment for a limited term.³ Moreover,

¹ *S.D.* 1906, 837. See also *ibid.* 824; *S.D.* 1886, 335-6; *The Week* (Toronto) January 29, 1885; *S.D.* 1909, 90.

² There appears to have been much greater independence in the Senate during the past few years. The present Leader of the Government in the Senate encourages such independence, as witness the following: 'For my part I refuse to lead a Ministerial party in this Chamber: I claim no followers; I shun party discipline and the party whip, I invite criticism of measures of the Government, criticism from the right as well as from the left; I feel that it is the responsibility of each Senator to try to improve the legislation that comes before us' (*S.D.* 1922, 16).

See also his invitation to the Senate to amend the Branch Lines Bill of 1923, *S.D.* 1281-2, and his reply to Senator Turriff's criticism that the Government had not taken its supporters in hand to pass the bill. 'My hon. friend has lived too long in the atmosphere of the House of Commons, and he speaks of followers. I do not recognise any followers of the Government in this Chamber' (*S.D.* 1924, 38).

³ From 1852 to 1891 appointments were for life, but in the latter year a seven-year term was substituted. Since then party lines appear to have been drawn more strictly than formerly, and if a Government stays in power for a long period the Opposition may be completely obliterated in the upper house. This happened during the period 1891 to 1912 when the Liberal Party was in power. In 1914 provision was made for electing the upper house, but the scheme has not yet been put into practice. See Lees-Smith, *Second Chambers*, chap. vi.

the long periods of office usually enjoyed by Canadian Governments would, under any system of term appointments of a reasonable length, cause the representation of parties in the Senate to be more out of proportion than it is at present. The Conservative Party was in power for eighteen consecutive years and the Liberal for fifteen. Term appointments for any shorter period would have destroyed completely the representation of the Opposition in the Senate. Yet life tenure has not secured independence in the matter of government legislation; in addition it has had other very serious consequences for the Senate. It has led to the presence of many old men and to the practice of appointing only elderly men. In 1920 the average age of the eighty-eight senators whose ages are given in the *Parliamentary Guide* was 64.7. Of these,

4 were under	-	-	-	-	-	50
23 were over 50 and under	-	-	-	-	-	60
40 were over 60 and under	-	-	-	-	-	70
16 were over 70 and under	-	-	-	-	-	80
5 were over	-	-	-	-	-	80

While the work of revision is not usually strenuous, and even old men may perform this duty admirably, the presence of so many old men and the absence of young ones, together with the high average age, is a serious psychological defect. The wits of aged judges are continually sharpened by the presence of aggressive and younger members of the Bar, and those of aged Cabinet Ministers in the Commons by the party battle and the continual interrogation of the Opposition, but there is no such stimulus for aged senators. In addition, the presence of so many old men, however able and alert some of them may be, reacts unfavourably throughout the country, and the Senate is continually lampooned as a 'Home for the Aged.' In the picturesque doggerel ascribed to Goldwin Smith, the general impression throughout

the nation is that the Senate is a means for old party men

‘To husband out life’s taper at the close
And keep the flame from wasting by repose.’¹

But not life tenure, nor the quality of the personnel, nor the use to which senatorships have at times been put is the most serious defect of the Senate. The greatest cause of its weakness is undoubtedly that it has been robbed of any political foundation. As Mill pointed out years ago, ‘An assembly which does not rest on the basis of some great power in the country is ineffectual against one which does.’² The House of Commons rests upon the electorate, the Prime Minister and his Cabinet rest upon the majority in the House of Commons, the Senate rests upon nothing but itself and the Prime Minister or party leader who has appointed its members. Therefore, when it opposes the House of Commons its action seems capricious and arbitrary. To the public such action is the antithesis of representative government, and the voice of the Senate is but the voice of the Minister who has appointed its members, ‘ventriloquising through his nominees.’³ This is the chief explanation of its weakness and of its unpopularity. The House of Lords still represents an important class in the community; the American Senate, even before it was elected directly by the people of the various states, represented the states; the Bundesrath under the German Empire represented the state governments; the Canadian Senate as a House of Parliament represents nothing. This is a psychological defect which no selection of personnel, however carefully made, could hope to overcome. The dice are loaded; even were the game fairly played it could have but one result.

¹ Quoted in Commons Debates, 1908, 1558.

See also Dawson, *Principle of Official Independence*, 247-8, and Stephen Leacock, *National Review*, July 1913, 995, for unfavourable opinions as to the effect of life tenure.

² Mill, *Representative Government*, chap. xiii.

³ *The Canadian Monthly* (Toronto), 1873, 425.

X

THE FUNCTIONS OF A SECOND CHAMBER : A BALANCE SHEET

THE bicameral system, says a prominent English historian, 'owes its existence in different places to widely differing causes, and the reasons by which it is supported in one country would often be fatal to its pretensions in another. The bicameral systems of the world have, in fact, little in common except the number two.'¹ Although there is truth in such a view, yet there is a marked similarity between certain second chambers in both form and function. Lord Bryce divides upper houses into three classes—those with legal and political powers equal to those of the lower house ; those which legally have powers equal or almost equal to those of the lower house, but which in practice exercise less, and those with less power both legally and practically.² Of the first the Senate of the United States is a good example ; of the second class the House of Lords is a type ; the Norwegian Lagthing exemplifies the third.³

Obviously the Senate of Canada belongs to the

¹ Prof. J. H. Morgan, *Contemporary Review*, May 1910, 553.

² *Modern Democracies*, ii. 401.

³ 'The Lagthing may either approve or reject a bill which the Odelsting submits, but may not amend it. A measure rejected is returned, with reasons for the rejection. Three courses are then open to the Odelsting ; to drop the measure, to submit it in amended form, or to resubmit it unchanged. When a bill from the Odelsting has been twice presented to the Lagthing, and has been a second time rejected, the two chambers are convened in joint session, and in this consolidated body proposals are carried by a two-thirds vote.' Ogg, *Governments of Europe* (ed. 1913), 583.

second class—those with powers which are legally almost equal to the powers of the lower but which in practice are much less. In regard to this class it may be possible to arrive at some general conclusions which may throw light upon the problem of the Senate.

We may dismiss the theory that upper houses of this class are a bulwark against social or political revolution. This theory, which was prevalent during the eighteenth and early nineteenth centuries, before modern democratic government had been tested, has now passed away with many of the political ideas of our grandfathers. An upper house strong enough to prevent revolution by constitutional means would, for that very reason, hasten revolution by force. Nor, on the other hand, can an upper house be considered a safeguard against retrogression to autocratic government. The possibility of a return to autocracy, which many thinkers on the problem of government consider likely because of the intolerable conditions of anarchy and misgovernment sometimes occurring in democracies, is less likely to result from direct assault than by the consent of the people. The enemies of democratic government are Mussolinis rather than Napoleons—demagogues rather than tyrants. A second chamber powerful enough to thwart a demagogue would have the appearance of flouting the wishes of the people and hence would only hasten its own destruction. It appears to be inevitable that in a democratic state an upper chamber constituted by any other method than direct election by the people must be a secondary line of defence of the constitution, a house of passive resistance only.

Mill, in his treatise on *Representative Government*, declared that he 'set little value on any check which a Second Chamber can apply to a democracy otherwise unchecked.'¹ Mill placed reliance upon the due representation in the lower chamber of all the minorities and interests of importance in the state, but English-

¹ Chapter xiii.

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speaking people have been notoriously slow to follow his suggestions of proportional representation. They have, however, evolved another means, the political party, the value of which Mill underestimated. In the organization of political parties democracy has placed checks upon itself. The party, as opposed to the economic or class group, is compelled by the force of circumstances to be a conservative institution. The larger the party and the more interests it is able to attract to its fold, the less likely is it to advocate revolution. If it is in office, its conservative instincts are enhanced by the responsibilities which fall upon it; if in opposition, self-interest and duty alike impel it to watch carefully the actions and policies of the Ministry, and to organize and unite against it all the opposed forces. Thus, 'the centre of resistance,' 'the poise of the constitution,' which Burke and his contemporaries believed lay in the existence of an aristocratic upper house, to-day lies, for the most part, in the party system rather than in any second chamber.

In Canada this is particularly the case. As we have observed previously, parties in Canada are in their very nature federal institutions. In addition, party programmes are designed to attract alike the industrial labourer and the capitalist, the farmer and the urban dweller, English-speaking and French-speaking citizens, the Canadian and foreign-born—in fact, all varieties and shades of opinion from the Atlantic seaboard to the Pacific. Moreover, the checks thus placed upon Canadian democracy are available against revolution in the social and political structure of the state or, as noted previously, against invasions of the political rights or interests of the provinces. Neither party can afford to disregard the wishes or opinions of a substantial portion of the electorate, or of any particular province or section. For example, in enforcing conscription against the wishes of Quebec in 1917, the Government so antagonized the people of the province that in the following election not a single Government

supporter was returned from the whole province. Necessary as the policy of the Government seemed in the circumstances, since it had a clear mandate from the majority of the people as a whole, the results are a permanent warning to any party.

The theory of an upper house as a check upon democracy had, after all, an undemocratic origin. It arose largely from Whig theories of the value of aristocracy and from Montesquieu's superficial analysis of British institutions, an analysis which impressed itself upon the Fathers of the American Constitution. It was inspired also by distrust of democracy founded on the false analogy of the direct democracies of the ancient world. In the flush of enthusiasm for democracy during the early nineteenth century many thinkers, realizing that the checking theory of an upper house was untenable, declared an upper house of no value whatever. 'Of what use will a Second Chamber be?' the Abbé Siéyès is reported to have asked, 'If it agrees with the Representative House it will be superfluous, if it disagrees, mischievous.'¹ Benjamin Franklin's preference for a single chamber at an earlier day is well known. He is said to have likened a legislature of two chambers to a cart with a horse hitched to both ends and each pulling in the opposite direction.² 'Is the Upper House to be composed of old men?' asked the old *Bystander*, 'It will be impotent. Of rich men?—It will be odious. Of the best and wisest men?—The Lower House, which, as the more popular remains the more powerful, will be left destitute of its natural guides and controllers. From this quandary . . . we really see no escape.'³

Modern opinion, however, with several more decades of history and more years of experiment in representative government in many lands as its guide, is

¹ Quoted Bryce, *Modern Democracies*, ii. 399.

² Ford, *Representative Government*, 278.

³ An unsigned article, probably by Goldwin Smith, *The Bystander*, 1880, 63.

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less disposed to pin its whole faith upon single chambers. This opinion is not necessarily founded on distrust of the people's ability to govern themselves or on any denial that their will must prevail, but it at least recognizes certain defects in popular assemblies. A no less enthusiastic supporter of popular government than Lord Bryce was led to admit, at the close of a life of study and observation of representative institutions, that there were serious weaknesses apparently inherent in representative government. His conclusions were as follows :

' Legislatures contain too little of the stores of knowledge, wisdom, and experience which each country possesses.

' Legislatures are liable to fall under the control of one political party disposed to press through, in a hasty or tyrannical spirit, measures conceived in the interests of that party or of a particular class in the community, often without allowing sufficient time for full debate, sometimes even by means of an organization of the ruling majority which binds all its members to support whatever measures have been adopted by the larger part of that majority. Where this happens it is not the legislature as a whole that governs, but a majority of a majority which may frequently be a minority of the whole body. . . .

' It has begun to be perceived that the existing legislative machinery of most countries does not sufficiently provide for the study of economic and social problems in a directly practical spirit by those on whom the duty falls of passing into law measures dealing with them, because legislatures incessantly occupied with party strife and with the supervision of the Executive in its daily work of administration have not the time, even if a sufficient number of their members have the capacity, for such investigation.' ¹

Nor did Bryce see indications that representative assemblies were likely so to be improved as to remedy these defects. On the contrary, the signs pointed in the other direction. Almost everywhere representative assemblies appeared to be declining in ability or failing to keep pace with the increasing complexity of government in the modern state. The principal causes

¹ *Modern Democracies*, ii. 411, 412.

assigned by Bryce for these defects are : the decline in respect for representatives and representative institutions which disposes members to live down to the estimate that the public places upon them ; the increasing number of interests of the average citizen which lead him to pay less attention than formerly to public questions ; the growing strictness of party organization which tends to keep men of independent mind out of politics ; the greater opportunity for careers in business and professional life which modern civilization has opened to talent ; and the payment of members which, however necessary it appears to be in democratic government, has attracted many men of only average ability and tends to keep all members anxious to preserve their seats for financial reasons.¹

These considerations induced Bryce to think that an upper chamber properly constituted would grow in usefulness. The duties of such an upper chamber would be complementary to those of the lower, that is, it should correct the errors into which its more popular partner was likely to fall. Obviously, its duties would vary from state to state according to the peculiar weaknesses to which the popular chamber was particularly subject in each. They would also depend to a considerable extent on the method by which the upper chamber was recruited. He was convinced that the upper chamber, as well as the popular assembly, must enjoy the respect and confidence of the public if it was to be of value. He felt, therefore, that the question of function could not be separated from the method of creating the upper chamber, and that it was not possible to lay down categorically the duties which should belong to every upper house.² In the report of the Conference on the Reform of the Second Chamber, of which Bryce was Chairman, certain functions which should be exercised by a reformed House of Lords are set down in concrete form. The problem of the upper chamber in Great Britain is so

¹ *Modern Democracies*, chapter lviii.

² *Ibid.* chapter lxiv.

similar to that of Canada that we are warranted in quoting these conclusions :

‘(1) The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

‘(2) The initiation of Bills dealing with subjects of a comparatively non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

‘(3) The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

‘(4) Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an Assembly whose debates and divisions do not involve the fate of the Executive Government.’¹

As to the revision of legislation, there is little doubt that any upper chamber ought to perform this duty. With regard to the initiation of non-controversial legislation, as we have already observed, in Canada this is so closely related to the internal organization of Parliament that we need not discuss it further. As to the value of the suspensive veto, however, there is some diversity of opinion. Mill concluded that the veto was only of psychological value, because it required the lower house to remember the fact that its acts would be reviewed and passed upon by another body, and hence impelled the lower house to go more carefully.²

¹ *Letter of Lord Bryce to the Prime Minister* (1918, Cmd. 9038), quoted in part in Appendix A.

² *Representative Government*, chapter xiii.

In Canada the possibility of the rejection of legislation by the Senate has sometimes been an excuse for the Commons to shirk its responsibility. Moreover, delay may sometimes be more objectionable than undue haste. Yet, as Bryce observes, the power of revision is very likely to be useless if it is not supported by the power of delay, and if an upper chamber has no other legislative powers than mere revision it is likely to deteriorate and to become merely a committee of drafting experts, rather than a house of advice and counsel. Nor would such a chamber attract men of ability and position. The tendency among modern institutions is overwhelmingly in favour of retaining the power of suspensive veto, while taking care to provide that the veto may be overridden in case of emergency or when the upper chamber misinterprets the opinion of the public.¹ The apparent purposes of such a veto are to make sure that the lower house gives to all legislation thorough consideration and, in case it seems to outrun or misrepresent public opinion, to compel the lower house to consult the electorate. The upper house thus becomes a sort of committee of referendum, as well as a safeguard against hasty or ill-considered action. As regards the fourth function, that of investigating and discussing public questions, it is so closely related to the quality of membership that we may leave this for discussion later.

In the light of these theories we are now in better position to strike a balance sheet of the merits and defects of the present Senate of Canada. On the credit side of the balance sheet may be set down the following merits of the Senate :

- i. It has been a very useful revising chamber. In comparison with the House of Commons it has the great advantage of leisure, because its time is not consumed in dealing with the estimates, the Speech

¹ See Bryce, *Modern Democracies*, ii. chapter lxiv, and *Letter to the Prime Minister*, Sec. 47 ff.

from the Throne, and questions of party tactics which occupy so much attention in the Commons. While it would be rash to say that the Senate might not have performed this duty of revision better than it has, on the whole it has been probably as satisfactory a revising chamber as the House of Lords or any other second chamber in existence. It has brought to the work of revision considerable maturity of judgment, careful consideration of detail, and a fair knowledge of the existing law and of the technique of draftsmanship, born of the long experience of many of its members as practical legislators. Nor is the work of revision merely 'dotting "i's" and crossing "t's"'; a great part of it is concerned with adjusting to each other the conflicting details of a statute, with bringing the whole statute or its details into conformity with the existing law, and with saving the rights of individuals and minorities. This is a task the necessity for which grows yearly with the increasing complexity of administration and the growing business of Parliament. There is a further need for it because of the adoption of the 'closure' as an ordinary rule of debate in the House of Commons, which, though as yet rarely resorted to, yet is a potential menace to sound legislation. Nor does the party complexion of the Senate seriously affect the work of revision. The great bulk of legislation is non-partisan in character and is dealt with, even in the House of Commons, without a party bias.

2. The Senate has been a fairly consistent check upon unwise legislation of various kinds, such as unsound private bills, minority legislation, and bills for social reform for which the time has not been ripe. While the Senate may sometimes have been mistaken in rejecting such legislation, in no case can it be said to have been obstructive, or to have rejected legislation which the public clearly demanded. To a large extent the task of sifting out and rejecting such legislation has been left to the Senate by the House of Commons,

which often prefers to pass over such legislation in silence because of possible votes at stake.

3. When the Senate has ventured to reject or amend important government measures it has rarely been mistaken in its view of public policy, or the real, as opposed to the temporary, opinion of the country. Nor can it be fairly said to have been obstructive on such occasions; on the contrary, the veto has never been more than suspensive. The Senate has never claimed to have the right to oppose the public opinion of the country whenever that opinion has been clearly expressed. But it is a serious criticism of the Senate that it has vetoed government bills very rarely when the same party was in the majority in both Houses. The fact that it has gauged so well public opinion at other times is almost conclusive evidence that the veto power could have been used with equal success when the majority of the Senate was politically in sympathy with the House of Commons. In short, the veto upon government measures, though successful when applied, has been exercised only intermittently.

4. The Senate is potentially an admirable means of discussing and investigating important public questions. Some of the reports of its special committees would do credit to any legislature, while its debates on important public questions are frequently full of valuable information and show a breadth of view not found in similar debates in the Commons. Yet it must be admitted that much of this work is of little practical value because of the low estimate placed upon the Senate by the general public.

5. The Senate has been a means of giving representation to racial and religious minorities, which they were unable to obtain from the party in power in the Commons.

6. The method of appointing senators has given to a Prime Minister a ready means of strengthening his Cabinet and the party as a whole. This use of the power of appointment, while often looked upon with

disfavour, has nevertheless been of considerable importance in securing able administrators for the service of the country.

On the debit side the following defects may be entered :

1. Undoubtedly the greatest defect of the Senate is that in a democratic community, governed by representative institutions and wedded to theories of popular sovereignty, the Senate rests upon no popular foundation. While the system of appointment may work well where the appointees are administrators for whose conduct the Ministry can be brought to account, or members of the Bench whose work is not to decide questions of public policy but to interpret existing law as it affects the relations of private individuals, yet it cannot be expected to work satisfactorily with appointees who deal with policy and for whose conduct no one but themselves can be held responsible. The Senate, if it is to be anything but a body of drafting experts, must, on occasion, take a hand in directing public policy, but whenever it does so it is very likely to meet with a storm of disapproval because its members have, after all, no political authority to voice anything but their own opinions. It matters little that these same opinions may be held by a substantial body of the electorate ; the fact remains that Senators have no mandate to speak for others than themselves. However useful the advice offered, however successful the Senate may have been in interpreting public policy or the real opinions of the electorate when it has opposed the Commons, the system by which it is constituted is the antithesis of representative government. A political institution constituted thus cannot be strong, influential, or trusted by the community at large.

2. While the Senate has tended to conserve legislative experience it has by no means conserved the best quality. Undoubtedly the Senate would be a more useful institution in amending legislation, though

it might also cause more trouble, if among its members were more ex-Cabinet Ministers either of the federal government or of the provinces. 'Back-benchers' may be useful because of their general knowledge of public questions and of the process of legislation, but they have not that detailed knowledge of the working of particular departments which is frequently necessary for proper criticism of departmental legislation. For this reason the presence of former Ministers in the Commons is often a stimulus and an assistance to the shaping of government legislation. Similarly, more men of this rank in the Senate would add to its practical usefulness.

3. There is undoubtedly considerable inertia in the Senate due to the security of tenure of its members and the preponderance of old men. This defect is, however, less serious than is ordinarily supposed. The duties of senators are not arduous, and even men of advanced age may perform them admirably. Some of the most active men in the Senate throughout its whole history have been former members of the Commons, or former Cabinet Ministers of advanced age. There is far less objection to appointing as senators aged men who have had long experience in the Commons as members, or as Ministers, or in provincial legislatures, than there is to appointing elderly business men or lawyers who have had no previous legislative experience. Appointees from this last class, many of them still absorbed in business, are frequently so much dead weight upon the Senate, and fail to take their legislative duties seriously, but the 'old party war horses' of the Commons have legislative habits already developed. But, even in the case of men who have been extremely active in the provincial field or in the lower house, it frequently happens that they succumb to the ever-present temptation of the Senate to rest on their laurels and enjoy the comforts and fellowship of perhaps the most interesting club in Canada. The reason is less the

impotence of age than the lotus-land atmosphere apparent in every upper chamber endowed with dignity but bereft of political power. A considerable degree of inertia as compared with the lower house must be expected in any upper chamber when the lower controls policy and makes or unmakes Governments. But it is increased in the Canadian Senate by the presence of too many old men who have had little experience in the detail of legislation, and by the fact that, while the door is closed to political advancement, the seats of senators are secure, so long as Providence continues their existence and their own efforts keep them out of bankruptcy.

4. The Senate has sometimes been composed almost entirely of members of a single party. This is the combined result which accrues from the system of appointment and the long terms of office enjoyed by Governments in Canada. While this defect is less serious than is ordinarily supposed, because the great bulk of the work performed by the Senate is non-partisan in character and is performed with little regard to party alignment, yet it seriously limits the usefulness of the Senate in checking government legislation of a questionable character. Senate majorities have always been more critical of the legislation of their political opponents than of their friends. Yet this is a human failing, and it is probably Utopian to fancy that the members of an upper house in a democratic state can assume an absolutely unpartisan position.

XI

TO MEND OR END THE SENATE

PROBABLY on no other public question in Canada has there been such unanimity of opinion as on that of the necessity for Senate reform. Opinion has differed, however, as to the means. This difficulty of agreement has been increased because, for the most part, critics have not taken into consideration the actual work which the Senate performs, neither have they always understood the position which a second chamber can occupy in parliamentary government, nor the position of the Senate as part of the federation compact. A thorough analysis of the problem from all three sides is a prerequisite to any satisfactory solution. The first two—the work of the Senate and the place of an upper chamber in the British system of government—have been discussed at length in the preceding chapter, and it will be unnecessary to enlarge upon them here. The third—the Senate as an expression of the federation compact—is perhaps worth reconsideration.

Centrifugal tendencies are almost as powerful to-day as they were in 1867, and they follow along the very lines which were then recognized by the principle of representation in the Senate. The principle of equality in the Senate for the three sections laid down at Quebec in 1864 simply recognized the ugly fact that there were two great gulfs which must be bridged before the provinces could be forged into a political entity. These were created, the one by the racial and religious

differences which separated Quebec from its neighbours, and the other by the peculiar economic interests of the Maritime Provinces which, while they served to unite the three provinces, at the same time separated them from the rest of Canada. After almost sixty years of union these gulfs still exist, and to-day there is a third, that between the East and the West, due to dissimilarity of economic interests between the industrial East and the agricultural West.

The principle of equal representation in the Senate for each of the four great divisions has been of value in bridging two only of the three political gaps. In practice, as has been pointed out, the Senate has had very little to do with protecting the provinces, and even when it has had the opportunity, it has not always used it. Nevertheless, there is no doubt that Quebec sees in the Senate a potential guardian, and the present system, unsatisfactory though it is in practice, does tend to allay Quebec's fears of coercion by the rest of Canada. As for the Maritime division, it is losing its membership in the House of Commons after each decennial census. While a larger proportion of members in the Senate than its population would warrant does not offset these losses, it is some compensation. The West, on the other hand, more pedantically democratic in its outlook, and conscious of its growing strength in the House of Commons, would joyfully abolish the Senate to-morrow, and is, in any case, little likely to oppose any reform acceptable to the rest of Canada. As for Ontario, its views regarding reform or abolition are substantially those of the West. The 'key' sections, therefore, to any scheme of reform are Quebec and the Maritime Provinces, but especially Quebec.

Legally, the British North America Act of 1867 is merely a statute of the British Parliament. Morally, it is a compact between the provinces of Canada. While there would be no legal objection to an amendment by the British Parliament which would abolish

the Senate or change the principle of representation therein, there would be a serious complaint on moral grounds unless the provinces concerned had previously given their consent to such an amendment. Indeed, any Government in Canada which would recommend such an amendment to the British Parliament without having first obtained the consent of the provinces would endanger its existence. For securing this consent there is a sound precedent in earlier conferences between provincial governments and the Dominion government to rearrange provincial subsidies.¹ The prior consent of the provinces is, therefore, required on moral and on political grounds, and is sponsored by precedent.

We are now in position to discuss the question of abolition or reform. At the outset, we may dismiss briefly the suggestion of abolition. The abolitionists have not credited the Senate with any practical usefulness, and consequently have not suggested any alternative means of performing the work which the Senate actually does. Many of them have based their conclusions upon the success of single chambers in the provinces. Yet the analogy of provincial legislatures is faulty. None of the provinces is under the necessity of recognizing in its frame of government the federal principle, which must be taken into account in the national constitution. Moreover, the business of the provincial legislatures is simple and small in comparison with that of the Dominion Parliament. Nor is there conclusive evidence that the quality of legislation turned out by the provinces with single chambers is as good as that of those with two chambers, or that of the Dominion Parliament.² Nor are the rights of property,

¹ For full discussion of this see Ross, *Canadian Magazine*, vol. xxxvii. 231, or Ross, *The Senate of Canada*.

² Sir Robert Borden declared the upper house in Nova Scotia to be a better legislature than the lower. *C.D.* 1906, 2309. Senator Ferguson (Ex-Prime Minister, P.E.I.) declared statutes of Quebec were better drafted than those of Ontario, and attributed the difference to the presence of an upper house in Quebec. *S.D.* 1906, 481. See also McMullen, *S.D.* 1906, 771; Daniel, *C.D.* 1908, 1562.

of minorities, or of individuals always adequately protected in the provinces.¹ While the Senate has not been an absolute guarantee for good legislation or the protection of rights, it has been of considerable value in working towards these ends, and if it should be abolished, common sense seems to indicate that some other means should be provided. There is, however, a more serious obstacle. The suggestion quite overlooks the plain political fact that abolition would not be acceptable to Quebec or the Maritime Provinces, for the reasons pointed out above. In the present state of opinion in Quebec at least, abolition is unthinkable.

As to reform, the pages of Hansard² and of the press of Canada contain many and varied suggestions. We may, for convenience of treatment, divide these into two classes: first, those which seek to improve the Senate by reform of the internal organization of Parliament or by development of conventions which would prevent the practice of appointing senators from a single party; secondly, those which seek reform by amendment of the constitution.

We shall discuss first some of the plans for reform within the constitutional powers of Parliament. For plans of this nature, it need scarcely be pointed out, there would not be the moral requirement of obtaining the consent of the provinces. With a view to giving the Senate more work it has been suggested many times that private bills be distributed more evenly between the Houses, or even that all private bills be introduced in the Senate as are divorce bills now.³ The objection, as we have seen, is in the refusal of individual members of the House of Commons to give up to senators the introduction of private bills, because it is a means of serving their own constituents. Were such a plan

¹ See H. W. A. Foster, 'The Menace of Confiscatory Legislation,' *Canadian Bankers' Magazine*, October 1923.

² *E.g.* S.D. 1906, 1908, 1924. C.D. 1874, 1876, 1906, 1908, 1925.

³ *E.g.* S.Y. 1868, 260. S.D. 1874, 186-8; 1885, 705; 1908, 884; 1910-11, 209-14. C.D. 1923, 4008-9.

adopted it would undoubtedly tend to relieve the House of Commons of much of the burden of private bill legislation and would give its members more time for public affairs, the real province of a representative assembly. But while it might give the Senate more work it would give it little more influence or popularity.

With the same end in view it has frequently been suggested in the Senate, and more recently in the House of Commons, that Ministers should be allowed to enter and take part in the debates in both Houses, though with the right of voting only in the House wherein they held seats.¹ This is a common practice in European legislatures, and appears to be useful in hastening business without giving upper houses more effective control over the Ministry than they would otherwise enjoy. Undoubtedly, it would assist also in hastening business in the Parliament of Canada. There is no reason why the great majority of non-partisan government bills should not be introduced in the Senate, a practice which would not only give the Senate more work to do in the early part of the session, but would also leave the House of Commons more leisure to do its really important work of watching the Ministry and of discussing and developing public policy. An objection to such a course might be that it would give the Senate a better opportunity to enter the controversial field of public policy and to try to control the government of the day. A Minister who had the right to appear in person and introduce legislation in the Senate could hardly refuse to return to answer questions or to defend attacks upon the Government. On the other hand, such a change would give the Government the opportunity to use senators as Cabinet Ministers. But so long as the Senate remains what it is—a body without adequate political foundation—and since the idea of Cabinet responsibility to the lower house alone is well-established in Canada, the changes which such a method might

¹ C.D. 1921, 1152-73.

introduce are little to be feared. But this proposal, like the preceding, fails to go to the roots of the problem.

Another plan advocated with a view to getting better representation of the Government in the Senate is the adoption of the British system of under-secretaries.¹ This system, on the two occasions on which it was attempted in Canada did not, however, give satisfaction. In each case the under-secretaries were in the Commons and the Ministers were in the Senate, and the system led, in the latter instance at least, to dissatisfaction among the rank and file of the Commons.² There are probably other difficulties, and certainly not the least is the distaste of any rising member of the House of Commons to play the rôle of assistant to a senator. No Government has yet experimented with the appointment of senators as under-secretaries to Ministers holding seats in the Commons, very probably because none has felt the need of doing so.

A somewhat similar plan has been urged at times by various senators, under which the position of Leader of the Government in the Senate would be done away with and a senator would be appointed by each Minister to take charge of the departmental business in the Senate.³ Such appointees would enjoy only semi-official positions and would not be responsible, either individually or collectively, for the policy of the Government or of their departments. They would not, in any case, be members of the Cabinet, or even Cabinet representatives. The sole responsibility placed upon each would be to furnish information connected with his department and to explain and defend departmental legislation. An analogous situation exists at present in regard to private bills in both Houses. Like a lawyer in a case, a member of either House takes charge of a private bill. He explains and defends it, if necessary, on the floor of the House; he sees to the proper procedure, and, in the name of the promoters, he accepts or rejects suggested amendments.

¹ *S.D.* 1908, *passim*.

² See *C.D.* 1919, 974.

³ *S.D.* 1922, 59.

Many senators believe that in removing all official representatives of the Government from the Senate there will be less chance of party pressure and a greater opportunity for treating legislation in a judicial way. It has been suggested that a departmental representative might very well continue his duties even when a new Government came into office. So far, however, the plan has found favour only in the Senate. When the Liberal Government came into office in 1921 the plan was pressed upon the Ministry by Senator Dandurand, but without result.¹ The difficulty probably is that Ministers feel that such a system might lead to greater interference on the part of the Senate in departmental business. Such a system would undoubtedly tend to break down what party discipline still remains in the Senate. It is doubtful, even if it were possible, whether any Government in Canada would be willing in every case to let the Senate test its legislation in a judicial way and accept it or reject it on its merits. But the first move must come from the Ministry and not from the Senate. Had any Government the courage to try the experiment it might greatly increase the freedom of the Senate, as well as give it more guidance in considering departmental legislation than it receives at present, owing to the intolerable burden of work placed upon the single Minister who represents the Government in the Senate.

Beneficial as any of these reforms might be, none of them goes to the root of the trouble, which is, undoubtedly, the system of appointment, and not the internal organization of Parliament. To remedy this defect there have been many proposals for a self-denying policy on the part of the Prime Minister, whereby he should restrict himself to appointing only those nominated by other means. It has been suggested that the House of Commons choose the candidates by ballot; that the Leader of the Opposition nominate every third candidate; that nominations be

¹ *S.D.* 1922, 16; 1924, 902.

made by provincial governments, or chosen by ballot in the provincial legislatures ; or that they be made by such public bodies as universities, Chambers of Commerce, etc. But no Prime Minister has yet been able to resist the tradition of party appointments, nor, as long as the spoils system for other important offices remains, is he likely to be able, even if he should wish, to break with the past. He is more or less a helpless tool in the grip of circumstances which he did not create and which he can do little to control. No Prime Minister is so quixotic as to reject a use of power providing at once a means of discipline and a source of reward to the faithful, and not only condoned but expected by friends and enemies alike. Such a system of nomination would give the Senate a more popular character than it has at present, but unless accompanied by constitutional restrictions on the appointing power it is for a political Utopia and not for Canada of the present day.

Among suggested reforms of the second type is the proposal to reduce the membership of the Senate to perhaps two-thirds or one-half its present numbers, retaining, of course, the system of appointment, the principle of equal representation of the four sections, and the powers now exercised by the Senate.¹ The object of such a plan is economy in government rather than reform of the Senate, since it would have little appreciable effect upon the activity or the influence of the present body. It is, however, in general true that the great bulk of the work now done by the Senate is done by half or less of its members. Yet this is a characteristic common to every legislature, and is quite as pronounced in the House of Commons as in the Senate. Some senators, particularly business men without parliamentary experience previous to their appointment, attend scarcely longer than is necessary to draw their sessional indemnities unless questions in which they have a particular interest are

¹ *S.D.* 1924, *passim*.

before Parliament. There can be little doubt that a properly constituted upper house of half the size could do all the work which now falls to the Senate, but a mere reduction in membership unless accompanied by a change in the system of appointment would be a reform of doubtful utility, because it would also reduce proportionately the number of active senators. The work now done by fifty or sixty senators might, if the membership were cut in half, be left to twenty-five or thirty. The Senate would then be little more than a legislative committee smaller in size than any of the important committees of the Commons. Under the circumstances the House of Commons and the country at large would be less disposed to trust the Senate than they are to-day. In short, it would put too much power over legislation in the hands of individual senators. In addition, it would double the work which now falls upon conscientious members. While for the greater part of the session there would be little harm in this, it would lessen the chances of leisurely discussion of bills during the closing days of the session, when numbers of poorly drafted, poorly digested bills are rushed through the House of Commons in an effort to finish up business before the heat of summer. It is at this stage that the revising hand of the Senate is most useful.

Other reformers have aimed at rejuvenation of the Senate by setting an age limit for retirement and perhaps even for appointment. An age limit for retirement would, however, be a mixed blessing. Age is not always a criterion of political uselessness, particularly in the Senate where physical vigour is far less essential than in the Commons. Nevertheless, an age limit of, perhaps, seventy-five might, on the whole, be useful. As for a maximum age limit for appointments, as has been pointed out elsewhere, there are less objections to appointing old parliamentarians than old business or professional men without experience in Parliament. Unless the limit were high, in which case it would be

of little use, it would undoubtedly tend to keep out the abler members of the House of Commons, since a member with ambition and ability would scarcely throw away his chances of attaining Cabinet rank for a seat in the Senate, however safe against the fortunes of war.

At the present moment many Canadians would favour curbing the Senate's 'veto power.' A plan which would no doubt commend itself to many would be that adopted by the United Kingdom in the Parliament Act of 1911.¹ This Act prevents the Lords rejecting or amending money bills and limits their power of rejecting ordinary bills to two successive sessions. A bill which now passes the British House of Commons for three successive sessions automatically becomes law, without the assent of the House of Lords. Sponsors of such a plan for the Senate fail to take into consideration the sentiments of Quebec and possibly of the Maritime Provinces, which are almost as serious an objection to limitation of the Senate's powers as to its abolition. The attitude of Quebec is clearly indicated by the resolution of its legislature during the session of 1925 in answer to the proposal contained in the Speech from the Throne at Ottawa the same year. This resolution, while welcoming reform, stated clearly that Quebec would not brook any limitation of the Senate's powers.² But should such a plan be agreed upon all the results would not be of pure gold. Some of the most important bills rejected on reasonable grounds by the Senate have been money bills, and to refuse it power to reject or amend such bills would be to throw off one of the few restraints upon the spending proclivities of the House of Commons. Although other and much more satisfactory restraints might be provided, there is the political objection to such a

¹ For a brief discussion of the effects of this Act see McBain and Rogers, *The New Constitutions of Europe*, 38 ff., or Ogg, *The Governments of Europe*, rev. ed., 155 ff.

² *Round Table*, June 1925, 563.

change that the interests of the provinces or of the sections may be invaded quite as easily by money bills as by any other kind of bill. As to limiting the rejection of ordinary bills, the number of bills rejected three or more times by the Senate since federation is insignificant. Even if the reform were possible, while it might satisfy democratic sentiments to some extent, and while it might allay popular distrust of the Senate, it would otherwise be of doubtful value.

Another reform based on extreme democratic theories is that of direct election by the people, either by proportional representation or by the ordinary method. The experience of the United States, both with the national Senate and with the Senates of the States, is surely sufficient evidence to set at rest any such proposals. 'In the United States,' says a competent American critic, 'Senates have everywhere acquired dominant authority in taxes, appropriations and general legislation. . . . If representation is divided between two chambers it is extremely liable to be confused, distracted and impaired.'¹ The result of popular election in both cases has been to create two bodies, both deriving their authority from the same source and consequently jealous of each other's power. Further, because the upper house is usually the smaller body, and is also usually elected at longer intervals than is the lower house, it has everything in its favour in this struggle for power. Countries such as Belgium and Australia, where parliamentary government is carried on with two elected chambers, have taken extraordinary precautions to allow for the supremacy of the lower house and so to prevent deadlocks between the two Houses. Without such precautions parliamentary government with two elected houses would be almost unworkable. In Canada, as has been pointed out several times, there are political reasons why the powers of the Senate should not be limited, and without limitations popular election is out of the question.

¹ H. J. Ford, *Representative Government*, 279.

As for indirect election by provincial legislatures or local bodies the result is illustrated by the experience of France. French senators are elected for nine-year terms by departmental electoral colleges consisting of the members from the Department in the Chamber of Deputies, members of the departmental council, members of the *arrondissement* councils within the Department, and one delegate from each of the communal councils. The French Senate thus represents the people on a different basis from the Chamber of Deputies and, though its electorate is once removed from the people, it has felt itself to be upon a sufficiently popular foundation to compel the retirement of individual Ministers at times, and on three occasions the resignation of the Cabinet.¹ The growing prestige of the Senate and the long tenure of seats have also tended to weaken the Chamber of Deputies by attracting its strongest members to the Senate. In addition, the Chamber has frequently shirked its responsibility in legislation, preferring to leave to the Senate questions which were politically dangerous. As a result, says M. Yves Guyot, 'the political axis has been displaced.'²

¹ Bourgeois Ministry, 1896; Briand Ministry, 1913; Herriot Ministry, 1925. Munro, *Governments of Europe* (N.Y. 1925), 425.

² 'These facts prove that the rôle of the Senate has not ceased to increase proportionately to that of the Chamber of Deputies, for these reasons:

(1) Its recruiting has steadily weakened the composition of the Chamber of Deputies.

(2) The Deputies have forsaken their real part of legislators and have voluntarily with the intent of escaping their responsibilities looked to the Senate to repair and control their errors, thus putting themselves under the leadership of that Assembly and giving it the most prominent rôle.

(3) The Senate, being only the expression of a restricted suffrage, the political axis has been displaced; but the Senate, fearing to enter boldly into a contest with the Chamber representing universal suffrage, has recourse to ruse and slackness of procedure to repulse plans which it disapproves of. Often, indeed, it yields in the end.

(4) The result is a great danger, owing to the illusion maintained in public opinion that the decisions of the Chamber are valueless and that "the Senate will arrange everything."

(5) The abdication of the Deputies has caused a deviation from the 1875 Constitution, and has corrupted public morality.'

Yves Guyot, 'The French Senate and the Chamber of Deputies,' *Contemporary Review*, xcvi. February 1910.

For a different view see Munro (*ibid.*), 447.

Any plan, therefore, which would provide for indirect election by municipal or local bodies is objectionable. It would place the Senate on a political foundation different from that of the House of Commons and thus tend to create antagonism between the two Houses. In addition, it would lead to the election of local politicians rather than men of national views. Moreover, it would inevitably encourage party organizations to enter municipal and local elections, an evil which Canada has fortunately so far escaped. As for throwing election into provincial legislatures or giving appointments outright to provincial governments, such suggestions also may be rejected without question. The inevitable consequence would be to make senatorships spoils for provincial politicians, a class on the whole much less able and experienced than federal politicians. 'Why thrust Dominion politics into the provincial legislatures?' asked Sir George Ross, when discussing this proposal. 'The smaller the pit, the fiercer the rats fight. The pit is small enough now, and the rats do fight fiercely, and if there is anything more to be fought for it will only intensify the struggle. . . . Would this piece of patronage raise the status of the legislatures? Does patronage raise the status of any party, any individual, or any body? I have my doubts on that subject.'¹

The problem of reconciling a foundation which is not out of line with democratic principles of government with the secondary and complementary rôle which an upper house ought to play in parliamentary government is difficult, but perhaps not insoluble. Norway appears to have solved it by providing for the election by the lower house of a portion of its members to serve as an upper chamber during the life of the lower house.² Norway's solution is thus an assembly committee endowed with the powers of a

¹ S.D. 1908, 112.

² Ogg, *The Governments of Europe* (ed. 1913), 583. Lees-Smith, *Second Chambers*.

second chamber. The principle of election of the upper by the lower house appears to be a sound one, in that it creates an institution subordinate to the lower chamber, not by reason of popular distrust but because it is the political child of the lower, just as is one of its own committees. It is, in fact, but an extension of the committee system. The essence of the committee system of legislation is that it provides a means of getting information and of discussing particular problems for which an assembly as a whole has not the time; in addition, it provides an extra precaution against hasty or unwise legislation. The Norwegian upper house enlarges upon this idea, and provides not a single extra stage for a bill, as does a committee in the lower chamber, but several extra stages. After all, an upper chamber in an advanced stage of parliamentary government such as Canada enjoys can do little more. If it has the legal power and the political authority to be other than complementary to the lower house in the matter of legislation it is likely to grow obstructive.

The Norwegian system fails, however, to bring to the business of government any different quality of membership from that of the lower house; nor does it tend to conserve legislative experience. The three most conspicuous examples of second chambers designed to fulfil both these aims are those of Italy, Ireland, and Belgium.

The Italian Senate is an appointed chamber, but it is unlike the Canadian Senate in that appointments are confined to twenty-one strictly defined categories of citizens who represent important elements in the nation's life.¹ These categories may be summed up in three classes: (1) high officials of church or state; (2) persons who have brought distinction to the nation through literature, science, art, or other meritorious service; (3) persons who during the three years previous

¹ Ogg, *ibid.* (rev. ed.), 525. See Appendix D, *post*, for complete list of categories for Belgium and Italy.

to their appointment have paid at least 3,000 lire (ordinarily about \$600) in income or direct property taxes. To secure that these categories are adhered to in making appointments, the Senate is given the power to judge of qualifications of appointees, and occasionally it refuses confirmation.¹ In practice the system has proven an admirable means of bringing men of eminence into the Senate, and it has produced a personnel unsurpassed in point of individual achievement by any second chamber on the continent.²

The revised constitution of Belgium of 1921 prescribes a similar system of categories.³ Unlike the Italian Senate, however, the Senate of Belgium is recruited by a combined system of popular election, indirect election by provincial councils; and co-optation by the Senate itself. The system of categories would seem to have ensured a high level of personal capacity; but popular election of three-fifths of its members, at the same time and by the same electors as the lower house, will probably have the result that the party complexion of the Senate will differ little from that of the Chamber. Under such a system it can scarcely be expected to treat party legislation in a non-partisan manner. It is, of course, too soon yet to estimate the practical value of the Belgian system.

The Irish constitution seeks the same ends by other

¹ Ogg, *The Governments of Europe* (rev. ed.), 527.

² 'As constituted in 1910, the body included in its membership the president of the Chamber of Deputies, 147 ex-deputies of six years' service and other men who had been elected to as many as three parliaments, one minister of state, six under-secretaries, five ambassadors, two envoys extraordinary, 23 officials of the courts of cassation and of other tribunals, 33 military and naval officers, eight councillors of state, 21 provincial functionaries, 41 members of the Royal Academy of Sciences, three members of the Superior Council of Public Instruction, two persons of distinguished service to the country, 71 payers of direct taxes in amount of 3,000 lire, and 19 other scattered representatives of several categories.' Ogg, *ibid.* 526.

³ T. H. Reed, *The Government and Politics of Belgium*, 74 ff. See Appendix D, *post*, for complete list of categories.

means.¹ Article twenty-nine of the constitution states :

‘ The Senate shall be composed of citizens who have done honour to the nation by reason of useful public service, or who, because of special qualifications or attainments, represent important aspects of the nation’s life.’

Citizens who are eligible for the lower chamber (the Dail) and who are thirty-five years of age or over are eligible for seats in the Senate. An ingenious system of double nomination by the two Houses is provided in order to secure the somewhat indefinite qualifications for senators required by the constitution. Nominations are to be made in either house according to rules prescribed by the Houses themselves, ‘ provided that each proposal shall be in writing and shall state the qualifications of the person proposed.’² The Houses then proceed to elect by proportional representation a panel of candidates which shall contain three times as many qualified persons as there are seats available. One-third of the panel is elected by the Senate and two-thirds by the Dail. In addition to the members elected to the panel, any member of the Senate whose term of office is expiring may stand for re-election. In addition, every university is empowered to elect two senators, one every six years, for a twelve-year term. From this combined list of candidates senators to the number of fifty-six are elected directly by the people, the whole of Ireland forming one constituency, by proportional representation for a twelve-year term, one-fourth retiring every three years.

It is, of course, too early yet to pass judgment upon the Irish method, and in any case it is scarcely applicable to Canada. Popular election on any basis tends to create a strong upper house. The Irish constitution safeguards the principle of ministerial responsibility to the lower house alone by writing the principle in the

¹ For complete text of Irish Constitution see *New York Times Current History*, 16 (August 1922).

² Art. 32.

constitution itself.¹ In addition, the veto powers of the Senate are strictly limited. In the case of money bills it may only suggest amendments within fourteen days after it has received the bill from the Dail. After fourteen days money bills become law even without the assent of the Senate.² In the case of ordinary legislation the Senate may hold up a bill for two hundred and seventy days, after which it is deemed to have been passed by both Houses, though the Senate may further suspend the bill for ninety days on the written demand of the majority, and require a referendum on the demand of three-fifths.³ It must be noticed, however, that these provisions do not apply to money bills or bills declared by both Houses to be emergency measures.⁴ Such restrictions upon the veto powers of the Canadian Senate are, in the present state of public opinion, unthinkable.

All the schemes I have discussed fall short of a satisfactory solution of the problem of the reform of the Canadian Senate. Stated in its simplest terms, the problem is : (1) to place the Senate upon a foundation sufficiently popular to give it the confidence of the public without at the same time endangering the principle of Cabinet responsibility to a single chamber ; (2) to conserve in its membership legislative and administrative experience ; (3) to bring into its membership also men of eminence in other walks of life besides party politics, in order that the Senate may not be a mere replica of the House of Commons ; (4) in addition, political considerations require the retention of equal representation for the four sections, and very probably all the present powers of the Senate. On the basis of these considerations I venture to make the following suggestions.

In order to place the Senate upon a popular foundation which shall at the same time keep it subordinate to the House of Commons, at least half of the Senate

¹ Arts. 51 and 53.

² Arts. 37, 39, 46.

³ Art. 37.

⁴ Art. 46.

should be elected by the House of Commons, the representatives of each section electing their own senators on a basis of proportional representation. Persons available for election by the House of Commons should be only from the class with which that House as a whole is most familiar, namely, those with experience in the House, or in provincial legislatures as ordinary members or as Ministers.

The selection of men of eminence in fields of activity other than party service should be left to the present method of appointment. In order to prevent party allegiance being the first consideration, as at present, appointments should be strictly limited to persons of experience in non-political public offices, or who should be acceptable to non-partisan groups of importance in the provinces or throughout the Dominion.

In order to keep the Senate in touch with changing conditions in the political, economic, and social life of the Dominion, while at the same time allowing for independence from the influence of temporary fluctuations in public opinion, seats should be held for a fixed term considerably longer than the term of seats in the lower house, but both appointed and elected senators retire on some principle of rotation.

*The following plan is an illustration of how these principles might be applied :

The term of office could be nine years, one-third of both elected and appointed senators retiring every three years.

One-half of the Senate, or sixteen members at each triennial period, could be elected by the House of Commons. Persons available for election should be only (a) former members of the House of Commons with at least four years' experience, and former members of provincial legislatures with at least six years' experience ; (b) former Cabinet Ministers of the Dominion with at least two years' experience,

and of a province with at least three years' experience ;
(c) former or retiring senators.

The remaining half, or sixteen at each triennial period, would then be appointed by the government of the day, but appointments should be confined to the following classes of persons : (a) Those who have served for at least three years in public offices of a non-partisan character, such as, Lieutenant-governors of the provinces ; Deputy Ministers or permanent heads of departments in the Dominion or provincial governments ; members of permanent boards and commissions, such as the Hydro-Electric Commission of Ontario, the National Railways Board, the Civil Service Commission ; persons who have represented the Dominion or a province abroad in such capacities as High Commissioner of Canada, Agent-General of a province, trade commissioner. Of this class not less than four nor more than eight should be appointed at any one time. (b) Persons nominated to the Governor-General-in-Council by certain public or semi-public bodies or professional associations which represent important elements in the life of the Dominion, and which had been empowered by statute to designate certain of their members who would be suitable candidates. Such nominees would constitute a panel of available candidates from which the Government might select appointees. A tentative list of associations is as follows : Provincial Associations of the United Farmers, Provincial Bar Associations, Chambers of Commerce or Boards of Trade of the larger cities, the Canadian Manufacturers' Association, the Trades and Labour Congress of Canada, the Royal Society of Canada, the Universities.

All appointments should be laid before Parliament, at least two weeks before going into effect, together with a statement of the qualifications of the appointees, and, for appointments made from the nominated classes, the name of the association which had made the nomination. This should ensure more criticism and publicity

than does the present system. In addition, the Senate itself might be empowered, as it is at present, to judge of the legal qualifications of appointees and to reject those which fail to meet the requirements. In making appointments the Government would, of course, be required to recognize the principle of equal representation of the four sections. Nor should it be allowed to appoint persons who, although they had the required qualifications, were at the time of their appointment members of the House of Commons or of a provincial legislature. Parliament might be allowed to enlarge or change both categories from which appointment could be made, in order to provide for changing conditions in economic and political life.

These suggestions are, of course, a mere outline of a reform scheme, the details of which, including the particular system of proportional representation to be used, the method of nominating candidates for election by the House of Commons, and provisions for replacing senators whose seats had become vacant before the expiration of the normal term, would require to be worked out later. These details should be easily adjusted after the essential principles of the plan were accepted. In addition, reform in the internal organization of Parliament might be suggested, such as methods of introducing more uncontroversial legislation in the Senate, and the admission of Ministers to both Houses ; but these are of minor importance, in comparison with reform of the system of appointment.

There can be little doubt that such a plan would give to the sections and the provinces greater control over the selection of senators than they now possess. Quebec, the province which has hitherto been apparently the strongest opponent of reform, should find adequate safeguards for her interests in a scheme which would allow to her representatives the right to elect half her senators, while the remainder would, at the worst, be quite as representative of her interests as are senators appointed under the present system.

It is true that the control of any province in the western or maritime sections over the selection of its senators would be less complete than that of Quebec, because representatives from other provinces within the section would also participate in their election, yet proportional representation would give to any of these provinces, with the possible exception of Prince Edward Island, the power to secure the election of suitable candidates, by the concentration of the votes of its members in the House of Commons, if the province so desired. For Prince Edward Island probably special safeguards would be required. It may, of course, be urged that election in the House of Commons should be by provinces rather than by sections, but this would mean that minority parties in the smaller provinces would not be able to secure representation in the Senate because only four seats from each section would be filled at each election. As has been pointed out above, sectional interests cut across provincial boundaries in both the East and the West, and are ordinarily of more importance in determining the relation of the people of these provinces to the rest of the Dominion than are the interests of the provinces. Party representation of each section as a whole in the Commons is, therefore, a better index of opinion in each section than if representation were arbitrarily divided, for purposes of election, on provincial lines.

It is believed, further, that the plan suggested would remedy the defects of the present Senate, while conserving most of its merits. In the first place, it should give to the Senate a sufficiently popular foundation to enable it to speak without arousing the antagonism and suspicion of the public as it does at present. On the other hand, since its only claim to representing the opinion of the public would be the election of half of its members by the House of Commons and nomination of others by non-political groups, it would have little ground upon which to oppose the House of Commons in mere trials of strength, or against the pronounced

opinions of the country. Should conflicts arise, the fact that the change in its membership would be at least twice as rapid as at present should prevent all danger of prolonged deadlocks. The rapidity with which the membership could be changed should be a sufficient alternative to curbing the Senate's veto power.

Secondly, it should make the Senate a more representative house than it is now. Election by the House of Commons, even if it did not select the best quality of experience, should provide a sufficient number of experienced legislators to ensure technical efficiency in legislation. It should also have the merit of securing representation for all important parties in the Commons, unlike the present system which secures representation only for the party which happens to be in power. The provisions for appointment of a required number of officials who had served the public in other than party harness should bring into the Senate men with a technical experience of administration and men with special knowledge of particular problems, such as foreign trade or imperial relations. At the present time the advice of such men, once they retire from office, is utterly lost to Parliament. While they may influence affairs in their capacity as private citizens it is rare indeed that any of them ever become members of either House of Parliament. As regards the second class of appointed members, they should, to some extent, be representative of important economic or professional groups because of nomination previous to appointment.¹ The fact of nomination should give them the character of legitimate spokesmen for their groups or associations, which appointment alone by a party leader can never give.

Thirdly, the presence of appointees from both classes should stimulate the Senate to greater investigation and discussion of public questions. The fact that a

¹ This would be a step towards functional representation, for discussion of which see Beard, *Economic Basis of Politics* (New York, 1922), 46 ff.; Duguit, *Traité de Droit Constitutionnel* (2nd ed. Paris, 1921), 506 ff.; G. H. D. Cole, *Social Theory* (New York, 1920), chap. viii.

member felt himself indirectly the representative of organized Labour, or of the United Farmers, or of a Chamber of Commerce, should encourage him to introduce problems which concern his group. Moreover, investigations or debates on such questions should attract attention, as they now fail to do, if for no other reason than that nominated senators would have definite constituencies through which to distribute published reports.

Fourthly, such a system should automatically remove most of the inertia in the present chamber which is due to the presence of old men who have passed their usefulness. Old men, unless of exceptional vigour and ability, would scarcely be likely to win election by the House of Commons or nomination by an outside body.

On the other hand, would the system rob the Senate of independence? It is conceivable that it might in two ways: in the first place, party lines might be drawn more strictly than at present, because election by the House of Commons would almost inevitably turn on party considerations; secondly, senators might be induced to consider their seats for the next election or renomination by their group or organization. But party organization is not to be always deplored even in an upper chamber. It introduces order for chaos, and responsibility alike for the conduct of business and for criticism.¹ In any legislature there would seem to be a necessity for compromise between the individual freedom of the members and party organization. The only important question is, Would the plan be likely to increase unduly party strictness and to include all the members within the party fold? The long term of office should be conducive to independence on the part of elected members. In addition, proportional representation should make for the representation of all important groups in the House of Commons,

¹ 'Party is a necessary and inevitable institution of democratic government on a large scale; and the problem, therefore, of creating a representative second chamber which will be outside its control is, by the nature of its conditions, insoluble.' Lees-Smith, *Second Chambers*, 135.

with the result that there is little likelihood of a single party gaining almost complete control of the Senate as at present. As for the appointed member, he would very likely be a party supporter, as now, though probably of not so deep a colour. If he were appointed from the panel nominated by outside bodies he would owe allegiance to two sources, the first the organization which had nominated him, the second the party leader who had appointed him. At present he need be loyal to one alone, and that the party leader. The presence of several members whose party loyalty would be an uncertain quantity should mitigate the evils of party control.

There is another possible objection—the complexity of the plan. Yet simplicity and efficiency do not always work together in framing institutions, and rarely, indeed, in the matter of creating a satisfactory second chamber. Practically all modern constitutions have provided complicated safeguards to avoid the Scylla of a supine and useless second chamber on the one hand and the Charybdis of a too powerful body on the other. Reformers of the Canadian Senate are compelled, in addition, to trim their plans to meet the sectional principle of the federation compact; otherwise reform will not be even launched. If public opinion in certain quarters could be weaned beforehand from attachment to this feature, a simple solution of the problem might be possible. The above plan is suggested on the assumption that at present this is improbable.

APPENDIX A

REPORT OF THE SECOND CHAMBER CONFERENCE¹

PART I²

DEAR PRIME MINISTER :

1. I have much pleasure in informing you that the Second Chamber Conference³ appointed by you on the 25th of August, 1917, has now completed its work, and that I am authorized to report to you the conclusions at which it has arrived. The examination, begun on October 2nd, 1917, of the numerous and intricate questions which it raised has occupied us more than six months, within which period we were able, although most of us were also occupied by work connected with the War, to hold forty-eight sittings, discussing these questions in their practical aspects and endeavouring to reach practical conclusions. The problems we had to deal with presented difficulties which can hardly be appreciated except by those who have steadily applied themselves to a prolonged study of the various issues involved. We had to adapt an ancient institution to new needs, fitting it in to a system which presents new conditions, and seeking to overcome prejudices and antagonisms which generations of party conflict had made acute. In particular we have been obliged to undertake the grave task of finding a basis for any Second Chamber which should be different in type and

¹ *Conference on the Reform of the Second Chamber : Letter from Viscount Bryce to the Prime Minister*, 1918. Cmd. 9038.

² Part II has been omitted because it merely summarizes the conclusions reached in part I.

³ The terms of reference were ; ' To inquire and report

(1) as to the nature and limitations of the legislative powers to be exercised by a reformed Second Chamber.

(2) as to the best mode of adjusting differences between the two Houses of Parliament.

(3) as to the changes which are desirable in order that the Second Chamber may in future be so constituted as to exercise fairly the functions appropriate to a Second Chamber.'

composition from the popular assembly, by including other elements which might be complementary to those which give its character to the House of Commons. Not less difficult was it to adjust the respective functions and powers of the two Chambers, vesting in the Second Chamber strength sufficient to enable it to act as a moderating influence in the conduct of national affairs, and yet not so much power of delay as to clog the machinery of Government, or dispose that Chamber to embark on controversies for the sake of asserting its own power. These were problems which, although frequently and carefully examined, had still remained unsolved, nor had the mind of the nation ever been fully addressed to them.

4. The Scheme here submitted requires some explanation and comments. These may be conveniently given if I begin by setting forth in the first place the matters in agreement from which the Conference started, by then proceeding to trace the lines upon which its deliberations moved, and by indicating the considerations which led it to the recommendations embodied in the Scheme. . . .

5. The Conference entered on its task by considering how far its members were agreed as to the functions appropriate to a Second Chamber, as to the elements that ought to be present in it, and as to the place it ought to fill in the scheme of the Constitution, and it was found that agreement existed upon the following points :

FUNCTIONS APPROPRIATE TO A SECOND CHAMBER

6. (1) The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

(2) The initiation of Bills dealing with subjects of a comparatively non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

(3) The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new principles of

legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

(4) Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. - Such discussions may often be all the more useful if conducted in an Assembly whose debates and divisions do not involve the fate of the Executive Government.

ELEMENTS THAT OUGHT TO FIND A PLACE IN THE SECOND CHAMBER

7. (1) Persons of experience in various forms of public work, such as judicial work, Local Government work, Civil Service work, Parliamentary work ; persons possessing special knowledge of important departments of the national life, such as Agriculture, Commerce, Industry, Finance, Education, Naval and Military Affairs ; and persons who possess a like special knowledge of what are called Imperial Questions such as Foreign Affairs and matters affecting the Overseas Dominions.

(2) Persons who, while likely to serve efficiently in a Second Chamber, may not have the physical vigour needed to bear the increasing strain which candidacy for a seat in the House of Commons, and service in it involve.

(3) A certain proportion of persons who are not extreme partizans, but of a cast of mind which enables them to judge political questions with calmness and comparative freedom from prejudice or bias. No Assembly can be expected to escape party spirit, but the excesses of that spirit usually can be moderated by the presence of a good many who do not yield to it.

POSITION WHICH THE SECOND CHAMBER OUGHT TO HOLD IN OUR CONSTITUTIONAL SYSTEM

8. It was agreed that a Second Chamber ought not to have equal powers with the House of Commons, nor aim at becoming a rival of that assembly. In particular, it should not have the power of making or unmaking Ministries, or enjoy equal rights in dealing with finance. This was prescribed not only by long-established custom and tradition, but also by the form of our Constitution, which makes the Executive depend upon the support of the House of Commons, and would be seriously affected in its working by extending to a Second Chamber the power of dismissing a Government.

All precautions that could be taken ought to be taken to secure that in a Reformed Second Chamber no one set of political opinions should be likely to have a marked and permanent predominance, and that the Chamber should be so composed as not to incur the charge of habitually acting under the influence of party motives.

The Second Chamber should aim at ascertaining the mind and views of the nation as a whole, and should recognize its full responsibility to the people, not setting itself to oppose the people's will, but only to comprehend and give effect to that will when adequately expressed.

It should possess that moral authority which an assembly derives not only from the fact that its members have been specially chosen to discharge important public duties but also from their personal eminence, from their acknowledged capacity to serve the nation, and from the confidence which their characters and careers are fitted to inspire.

It should, by the exercise of this authority, and especially by evincing a superiority to factious motives, endeavour to enlighten and influence the people through its debates, and be recognized by the people as qualified, when a proper occasion arose, to require the reconsideration of important measures on which their opinion had not been fully ascertained.

Lastly, the Conference was also of opinion that it would enhance the authority of the Second Chamber, and would be in line with the whole constitutional history of this country, which has been marked by a steady and gradual development, broken by no sudden and violent change, that so far as is possible a continuity should be preserved between the ancient House of Lords and the new Second Chamber, the best traditions of the former being handed on to the new body, so as to enhance its dignity, and make a seat in it an object of legitimate ambition. The Great Council of the Nation from which the House of Lords directly descends, the House of Commons having been added to it in the thirteenth century, is the oldest and most venerable of all British institutions, reaching back beyond the Norman Conquest, and beyond King Alfred, into the shadowy regions of Teutonic antiquity.

COMPOSITION OF THE SECOND CHAMBER

9. Of the three topics to which the Reference directed its attention, the Conference thought it best to begin with that which relates to the composition of the Second Chamber. It is the most difficult of these topics. It was debated at the

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greatest length, and it provided the most frequent occasions for reconciling divergent views.

10. The principle of endeavouring to preserve some real measure of continuity between the House of Lords and the new Second Chamber, a principle accepted by all, though some members attached more importance to it than did others, suggested that a certain portion of the Chamber should be taken from the existing peerage, but the other principle that three important requisites for the strength of the Chamber would be found in its having popular authority behind it, in its opening to the whole of His Majesty's subjects free and equal access to the Chamber, and in its being made responsive to the thoughts and sentiments of the people, also prescribed that the large majority of the members should be so chosen as to enjoy that popular authority. It is with the constitution of this majority that this narrative begins.

11. The Conference rejected the idea of having a Chamber elected on the basis of a property qualification, possessed by a privileged class of voters, and also that of requiring a property qualification for the persons to be elected, restrictions which have been adopted in some countries, but which were deemed unsuitable to modern conditions. Neither was it thought that the plan (sometimes suggested) that the persons chosen to sit should be taken from certain prescribed categories (*e.g.* from those who had filled some public office) would work well, for it would be very difficult to draw up any satisfactory list of categories which might not be either too large to be useful, or too restricted to permit many men of eminence and worth to be admitted as nominees. The Conference then proceeded to examine five methods that might be adopted for constituting that popular element in the Chamber which it had been agreed to make predominant.

VARIOUS ALTERNATIVE METHODS OF COMPOSITION

I. NOMINATION

12. The first method was that of nomination by the Crown acting through its ministers. This plan appeared unlikely to find favour with the country, because it did not provide any guarantees for the fitness of the persons who might be nominated, and because it would be liable to be frequently employed as a reward for political party services. Nor was it held that a provision requiring that the persons to be nominated should

be taken from certain prescribed categories would furnish an answer to these objections.

II. DIRECT ELECTION

13. The second method was Direct Election by the same voters as those who choose the House of Commons. Strong arguments were advanced for this plan.

It would produce a Chamber both homogeneous and directly responsible to the people, and with the weight of their will behind it. Coming straight from the people it would enjoy their confidence and mirror their views and ideas. If the elections took place frequently, there would be a constant ascertainment and renewal of the most recent public opinion, refreshing and strengthening the Second Chamber.

14. On the other hand, it was forcibly urged that a Chamber elected on the same franchise as the House of Commons would inevitably become a rival of the House of Commons, and would, because it had an equal 'mandate' from the people, be likely to claim equal financial powers, and tend to fall into conflict with that principle of the Constitution which assigns to the House of Commons the function of making and unmaking Administrations. Ministers would have two masters to serve and to fear. The persons directly elected would be presumably of the same general type as those elected to the House of Commons, so that no new element such as is admittedly desirable would thereby be introduced into the Legislature. The Second Chamber would in fact be little more than a duplicate of the House of Commons, and might either, as being the less attractive body, come to be composed mainly of the surplus material of the latter, or (alternatively) by the longer tenure of its members become ultimately the more attractive, possibly the more influential legislative body. The constituencies which would have to be created for a comparatively small body such as the new Second Chamber would be so much larger than the constituencies which now elect members to the House of Commons, that they would be more readily controlled by party organizations. As the expense of contesting these larger constituencies would also be heavier, an advantage would thus be given to wealthy candidates.

These considerations led the Conference as a whole to decide against the scheme of Direct Election, and we accordingly passed on to consider methods of Indirect Election. Several such methods presented themselves.

III. ELECTION BY LOCAL AUTHORITIES

15. It was suggested that the choice of members of the Second Chamber might be entrusted to Local Authorities, grouped in local areas of suitable size. The Councils of counties and of county boroughs, possibly with the addition of Councils of the larger non-county boroughs, urban districts, and rural districts, might constitute such electing bodies, or delegates from these Local Authorities might be formed into what are called 'electoral colleges' for certain local territorial areas. In this way an electorate of picked men, chosen by the people in their several local government areas, and in so far qualified to represent the people, might be created; and these would select for the Second Chamber men of local influence and practical experience in affairs. Such elections might be conducted without the cost and the partisanship which seem inseparable from direct elections, and might give as good, or even a better, result in the quality of the persons selected.

16. Although this plan had the great attraction of providing a new basis for a Second Chamber, several objections were taken to it. It was argued that it would certainly introduce party politics into the elections of those County Councils and Borough Councils which had hitherto been conducted on non-party lines, and would intensify party spirit in those local elections where that spirit already existed in a mild form, or in those which turn upon issues different from the issues raised in Parliamentary contests. The result would be to lead local government voters to think, when they were voting, more of a candidate's political opinions than of his fitness for local work, while it would cause the Councils themselves to be divided, in the discharge of their proper functions of local administration, upon party lines, and would thus impair their efficiency. As the members of local government bodies are now selected for duties which have little to do with national politics, there was no solid ground for thrusting upon them the very different duty of choosing a body fitted to discharge the political functions of a Second Chamber. In many large districts of Great Britain, the local borough and county councils are composed predominantly of members of some one political party, so that in those districts that party, whichever it was, would capture almost the whole of the representation in the Second Chamber, the men of merit who did not belong to that party being passed over, and the voters belonging to it being left unrepresented. Even the adoption of proportional representation would not remedy this evil.

These latter arguments ultimately prevailed.

IV. SELECTION BY A JOINT STANDING COMMITTEE OF
BOTH HOUSES

17. A fourth plan was then examined. It was that of placing the selection of the Second Chamber in the hands of some weighty, impartial and independent authority, constituted in accordance with the proposal made at paragraph 27 of this Report for the selection of those Members of the Second Chamber who will be taken in the first instance from the Peerage.

Those who supported these views recommended that the Members of the Second Chamber, whether selected from the Peerage or not, might be chosen by a Committee of Selection, drawn in equal or nearly equal numbers, from both Houses of Parliament; that this Committee or Commission should be a small one, not exceeding 20 in number, that its Members might, in the first instance, be selected by agreement, and that the names of the original Members might be given in a schedule of the Bill for reconstituting the Second Chamber, and thus obtain the sanction of both Houses of Parliament. Two Members of the Commission might, it was thought, retire every year, and the vacancies thus created, as well as casual vacancies, might be filled by co-option. The names of the new Members should be laid upon the Table of both Houses for 30 days in order to afford Parliament an opportunity of taking exception to the proposed selection. If, in either House, a motion were made and carried that the nomination be not approved, it could be cancelled and a fresh nomination required.

18. While the scheme thus outlined found considerable support in the Conference, the majority thought it essential to provide a broader basis for the Second Chamber than election by any Commission, even one set up and renewed by Parliament, could furnish. These members sought that broader basis in the election of a Second Chamber by Parliament itself. They urged that, while a commission such as that proposed would no doubt bring into the Second Chamber men of personal eminence, this fact alone was not sufficient to justify the method, as it was universally admitted that both high ability and personal eminence were to be amply found in the existing House of Lords. Nor, in their view, was it enough to secure that the new Second Chamber should be a balanced body. What was necessary was that it should be as far as possible a representative body. They held that since direct election by the voters had been ruled out by difficulties (already indicated) which had been deemed insuperable, the nearest

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approach to the advantages claimed for the method of direct election was to vest the selection of the bulk of members of the Second Chamber in the persons whom the voters had chosen to represent them in Parliament.

V. ELECTION BY THE HOUSE OF COMMONS

19. There were two ways in which this might be done. The House of Commons might vote as a whole for the election of a Second Chamber, or it might be divided into groups, each of which would be entrusted with the election of a certain number of members of the Second Chamber. It was objected to the former course that an election by the whole of the House of Commons must inevitably become a purely party contest, a contest which would be managed by the party Whips and would turn upon the party pledges or party services of the persons to be elected, too little regard being paid to their personal qualifications. Proportional Representation, it was thought, would not remove this objection, as it would not be practicable if applied to an election in which the list of candidates might contain several hundred names, and in which the quota would be so low that a very few electors could, by combining together, secure the return of any candidate. Such an election would, therefore, fail to secure the kind of Chamber which the country is believed to desire.

20. On the other hand, if the members of the House of Commons were to be divided into groups representing certain large divisions of the country, and were to meet in such groups to elect the persons they held to be best fitted for the Second Chamber, the dangers just referred to would be less likely to arise. The members of Parliament composing the groups might be expected to know the men best fitted to represent the needs and wishes of the parts of the country from which they themselves come, and they would act under a sense of responsibility to their constituents which could not be enforced upon the House of Commons as a whole. They would be able to meet, in numbers not too large for friendly discussion and compromise, to select persons who would better represent the different political parties, and they might also reserve a number of seats for men who were not active party politicians, but seemed qualified to regard current questions in a fair and impartial spirit.

21. These considerations secured a marked preponderance in the Conference for this plan over that of an election by the House of Commons acting as a whole, and when the question

came to be between this second or 'Group' scheme and the fourth plan, described in paragraph 17, that of election by an electoral Commission of Members of both Houses, the scheme of election by geographical groups of Members of the House of Commons obtained the larger support.

22. Those, however, who supported this fourth plan remained unconvinced by the arguments used in favour of election by the House of Commons, even acting by groups, and desired to have it placed on record that they were opposed on the following grounds to the method of composition recommended by the majority of the Conference.¹

23. They held it improbable that election by groups of Members of Parliament would produce a body of men possessing the attributes required for a Second Chamber, or well qualified to assume the functions assigned to that body. Elected by men who were themselves inevitably partisans, they could (so it was thought) scarcely be expected to be themselves free from partisanship. They would almost inevitably be chosen as party men and feel themselves bound by party ties. Apart from this it was feared—so these members argued—that the system would lend itself to transactions and bargains of the most undesirable kind. A very small number of the electors could by proportional machinery choose a member of the Second Chamber. There would often be an irresistible temptation to choose persons, not because of their eminence or their fitness to take part in the business of the Second Chamber, but because it was desired to reward them for party services, political or pecuniary, or even because of personal friendship. If it were open to the groups to choose sitting Members of the House of Commons, the opportunity could be used to place the seats of such Members at the disposal of party candidates, or in other cases, to get rid of a Member whose popularity was waning in order to replace him by one more enterprising and useful to his party. They apprehended that in all these transactions, which might take an infinite variety of shapes, the Party organization, supported by the large funds, derived from various sources, which it controls, would tend to make itself more felt than ever. They further urged that if the functions and position of the Second Chamber were to be those which the Conference had decided to assign to it, it ought to be

¹ The names of these members are as follows : Duke of Rutland, Marquess of Lansdowne, Earl of Dunraven, Earl of Loreburn, Lord Balfour of Burleigh, Lord Sydenham, Lord Hugh Cecil.

Sir George Younger, while not supporting the fourth plan, desires to join in this dissent.

different from the House of Commons in character and unlikely to become its rival, and that it would therefore be unwise to set up alongside of the House of Commons a Second Chamber founded upon the same elective principle as that which gives authority to the House of Commons, but possessing that authority in slighter measure and working through a machinery open to grave criticism. Being itself a creation of the House of Commons it would furnish an insufficient check on that body.

24. In reply to these arguments it was contended that the responsibility of Members of the House of Commons, electing in groups, to their own constituents and to the great mass of voters of the large area which they would for this purpose represent, would restrain that partisanship which was so much feared. The groups would be anxious to return persons of high political standing, and also to study local sentiment. Thus they would not be subservient to the control of party managers and whips, and this responsibility would give a guarantee against the exercise of the kind of undue influence which was apprehended. Supposing such a centre of corrupting influences to exist, it might reasonably, they argued, be maintained that a small Electoral Commission, even one appointed under the authority of Parliament, and from members of Parliament, would be not less open to the action of such influences than would be the numerous and considerably larger electing bodies composed of members of the House of Commons which form the basis of the scheme here recommended. As to the need of a principle of differentiation between the Second Chamber and the House of Commons, which would prevent any tendency of the former to become a rival of the latter, they were agreed. They found such a principle not only in the indirectly representative character of a Second Chamber based upon election by the House of Commons but also in the other differences which were features of the scheme as a whole and are detailed below—the proposed longer tenure, the different legislative and financial powers and the smaller size of that body. Moved by these considerations, the majority of the Conference adhered to the method of election by members of the House of Commons grouped in territorial areas which will be found set out in Part II of the report.

METHOD OF COMPOSITION ADOPTED

25. The method of election by Members of the House of Commons grouped in large territorial areas having been thus adopted by the large majority of the Conference, the next step

was to constitute the proposed geographical groups to which the function of electing should be assigned, and to settle the number of seats in the Second Chamber which each group should elect, the respective populations of the areas of these geographical groups being taken as the basis for the number of seats to be allotted to each area. It was necessary that the areas should be comparatively few, that the boundaries of counties should be respected, and that their respective populations should, so far as possible, be nearly equal. The plan of voting by Proportional Representation, which was adopted because it would help to secure a due representation of all political parties, made it desirable that the number of seats to be filled by each group should be not less than five at each election. Thus, assuming that the Chamber should be (as hereafter explained) renewed by one-third at a time, the total number of seats to be allotted to the area of each group would be not less than fifteen. These considerations and an examination of the economic conditions, agricultural, manufacturing, and commercial, of the different parts of Great Britain, and of the respective characters and affinities of their inhabitants, led us to a division of the Island into thirteen areas for the election of the Second Chamber. All, or nearly all, of these areas have the advantage of being what may be called 'natural entities,' the counties which compose each area having a certain natural connection with one another, and some of them even a measure of distinctive racial quality, corresponding to those ancient divisions of the country out of which the United Kingdom has grown. . . . The total number of members of the Second Chamber who would be chosen on this plan for Great Britain is 246. The number to be allotted to Ireland, and the method by which Members of the Second Chamber coming therefrom were to be chosen was reserved, pending a settlement of the questions which affect the representation of Ireland in the House of Commons.

26. The large majority of the Second Chamber having been thus constituted upon a principle which was deemed such as would give a thoroughly popular character to the Chamber as a whole, the Conference had next to consider the means by which the historical continuity of the reconstructed Second Chamber with the ancient House of Lords could be preserved. Two arguments enforced the desirability of avoiding a complete breach with the past. One has already been adverted to. The respect which it is desirable that the nation should feel for the Second Chamber will be all the greater if it be regarded as an ancient institution remodelled in accordance with modern

views and feelings rather than as a brand new creation. The other consideration was, that among the existing peers there are many men of distinguished ability and long experience in legislation and administration, men whose services the country would desire to retain. It was accordingly determined, some few dissenting, that a part of the Second Chamber should be chosen from the peers. It was also deemed proper (though again with some difference of opinion) that among those to be thus selected a certain small number should be taken from the Episcopal Bench. The Spiritual Peers constitute one of the most ancient elements of the Great Council of the Nation, having sat in that Council before the Norman Conquest and formed at some moments before the Reformation (including the mitred abbots) about one-half of it. Thus, as the principle of continuity suggested their presence, so it was also urged by some members that the legal position which the Church of England holds, Parliament being the body which legislates for it, made it proper to have in the legislature persons entitled to speak on its behalf and directly conversant with the works, social as well as religious, which it performs. In fixing the number to be taken from the existing House of Lords it was thought proper to make it somewhat larger at the outset, in order to find room for those peers who had been taking an active share in public business, than it need continue to be in the future years. Accordingly the Conference recommends that the number of this Section should be fixed at eighty-one, that, in the first instance, the whole Section should be chosen from the Peers, but that subsequently, the number of Peers in this Section should be gradually reduced, in the manner described in paragraph 36, to thirty, the remaining fifty-one seats being thus thrown open to persons who need not be Peers. As will presently be seen, it is thought necessary that both numbers, the temporary and the permanent, should be divisible by three.

27. For the election of these Peerage Members two alternative courses were open. One was to let them be chosen by the whole body of Peers. This was rejected largely for the same reasons as had prevailed against the election of Members of the Second Chamber by the House of Commons as a whole, namely, that the election would be likely to fall under the control of party motives and party managers. The alternative course was to create a Committee of Parliament, specially qualified for this delicate function. The Conference accordingly proposes that a Joint Standing Committee of both Houses of Parliament be set up to be composed of men of authority

and experience, and representing every political party. Those members of this Commission, who would come at the first election from the present House of Lords, and thereafter from the new Second Chamber, would be chosen by the Committee of Selection in that House. The members coming from the House of Commons might be chosen by the Speaker. It is suggested that five persons from each House would form a sufficiently large Electoral Commission or Committee. It would be set up at the beginning of each Parliament, and such vacancies as may occur in its membership would be filled up by the Second Chamber Committee of Selection, or by the Speaker of the House of Commons, as the case might be. Such a Committee might be trusted to see to it that due representation was given to every shade of political opinion.

PERIOD OF TENURE OF A SEAT IN THE SECOND CHAMBER

28. From the principle, generally accepted in this country and universally acted upon in other countries, that a Second Chamber shall, as compared with the larger and directly elected House, represent the more permanent mental attitude and tendencies of the nation, and be more exempt from sudden and violent fluctuations of opinion, two conclusions seemed to follow :

First. That the tenure of a member of the Second Chamber shall be longer than that of a member of the House of Commons.

Secondly. That the Second Chamber shall not be renewed in its entirety all at once, but as to a part only, a proportion of its members retiring at stated intervals.

29. It is therefore recommended, applying these conclusions, that the tenure of a seat in the Second Chamber be fixed at twelve years for both the above-mentioned Sections ; and that one-third of each Section shall retire every fourth year.

This plan seems to offer two advantages :

- (a) that the Second Chamber, while not suddenly changing as a whole under a momentary popular impulse, shall be kept in constant touch with public opinion in a way which could not be secured under a scheme of Life Tenure, and
- (b) that it will always contain a considerable section of members who will have acquired legislative experience and a mastery of public affairs by a service of some length.

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30. The following table shows the proposed composition of the Second Chamber :—

SECTION.	NUMBER	PERIOD OF TENURE OF SEAT.
I. Persons elected by Members of the House of Commons grouped in territorial areas	246	12 years (one-third to retire every 4 years).
II. Persons elected by a Joint Standing Committee of both Houses	81	12 years (one-third to retire every 4 years).

NECESSARY MODIFICATIONS IN THE CASE OF THE SECOND CHAMBER TO BE FIRST CONSTITUTED

31. The system here set forth for the composition of the Second Chamber does not admit of being applied in its entirety to the composition of the Second Chamber to be first constituted. An essential feature of this system is that not more than one-third of the major portion of the Chamber should be elected at any one time or by a single House of Commons. It is proposed to meet this difficulty which arises in the case of the initial constitution of the Second Chamber as follows :—

AS REGARDS THE SECTION TO BE ELECTED BY THE HOUSE OF COMMONS

32. One-third of this section should be elected by members of the *present* House of Commons grouped in territorial areas according to the plan proposed for all subsequent elections of the Second Chamber. This third should retire at the end of four years.

One-third of this portion of the Second Chamber should be similarly elected by members of the *next* House of Commons, and retire at the end of eight years.

The remaining third would be elected by the Joint Committee of both Houses already provided for the purpose of electing that portion of the Second Chamber in which members of the Peerage are to be represented.

This remaining third should sit for the full period of twelve years. (*See the Table below.*)

On this system, at the end of four years the machinery of election by the House of Commons existing at the time when each quadrennial period ended would come in to full operation, and at the end of twelve years, the whole of the Second Chamber would have been constituted according to the method here proposed, every elected member sitting for twelve years,

and the Chamber being renewed by one-third every four years.

33. It will be seen that it is assumed that a start will be made with the composition of the new Second Chamber during the lifetime of the present House of Commons. If legislation for the constitution of the Chamber were to be deferred until the next Parliament, certain modifications would obviously have to be made.

34. The question arises which of the three electing agencies proposed should elect its quota of a third of the Second Chamber first. It is conceived that the Joint Standing Commission should elect first, on the ground that such a body would be well qualified to have regard in making its choice to the country as a whole, and thus include persons of eminence who might not have any connection with particular geographical areas.

AS REGARDS THE SECTION TO BE ELECTED BY THE JOINT
• STANDING COMMISSION

35. As the whole of this section is to be elected, on the first as on future occasions, by the Joint Commission, the Conference think that it may be left to the Commission to assign to the persons chosen a term of four, eight, or twelve years, respectively, as it may think fit.

36. As stated above the election on this first occasion would be from the Peers exclusively.

At the second and third elections, however, the principle above referred to, of gradually throwing open the section to other persons besides Peers, should be put into operation, and at these elections half only of the vacancies should be reserved for Peers, while at subsequent elections the choice of the Joint Committee should be unrestricted, subject only to the provision that the number of Peers so selected sitting in the Second Chamber should not fall below thirty.

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37. TABLE SHOWING METHOD PROPOSED FOR THE COMPOSITION OF THE SECOND CHAMBER AT THE OUTSET

SECTION.	METHOD OF COMPOSITION.	PERIOD OF TENURE OF SEATS.
I. Majority of House, 246	1. Election by Members of present House of Commons, 82	4 years
	2. Election by Members of next House of Commons, 82.	8 years
	3. Election by Joint Standing Commission of both Houses, 82.	12 years
II. Section chosen by Joint Commission of both Houses, 81	Election by Joint Standing Commission of both Houses.	4, 8, and 12 years

GENERAL PROVISIONS RELATING TO THE COMPOSITION OF THE SECOND CHAMBER

38. Some other points relating to the composition of the Second Chamber remain to be mentioned. One of these relates to the Law Lords, who sit under the Appellate Jurisdiction Acts, 1876 and 1887. It is thought, that if and so long as the Second Chamber continues to discharge the judicial functions now discharged by the House of Lords as Supreme Court of Appeal, these high judicial personages should continue to sit as *ex officio* members. Their presence will add to its deliberations an element of special knowledge and long experience which will doubtless be available in the future, as it has been in the past, for the purpose of revising Bills and securing that the form in which they pass shall be legally correct. The same considerations apply to the Lord Chancellor and to those ex-Lord Chancellors who take part in the judicial business of the House. It is suggested that they ought to remain *ex officio* members while they sit as Judges of Appeal. It has long been the practice that members of the Royal House, created Peers, should sit in that capacity, though for some generations past they have neither joined in debate nor otherwise taken part in political life. The Conference thought that this practice might be so far continued as to allow the sons and grandsons of a Sovereign to sit in the Second Chamber.

39. Doubts arose as to whether the Lord Chancellor should continue to act as Chairman of the Second Chamber by appointment of the Crown for, though he puts the question in the House of Lords, he is not responsible for keeping order

there and does not call upon members to rise and speak, and, being a member of the Cabinet, he joins in debate on behalf of the Government, and votes in a division. The view, however, prevailed that the traditions of his high office should continue to add dignity to the position of Speaker of the Chamber.

40. Several other questions relating to the composition of the Second Chamber require a brief mention.

The disqualifications for membership of the House of Commons now by law existing, ought, for the most part, to be applied to the Second Chamber also, excepting, however, those which exclude the Clergy of the Established Churches of England and Scotland, and of the Roman Catholic Church.¹ Whether the provisions which exclude, with certain important exceptions, persons holding offices of profit under the Crown, individuals or members of firms holding contracts with the Government, and also the holders of pensions paid out of public funds, should be applied to the Second Chamber—these are questions which deserve serious examination. They are, however, of so delicate a nature, the law as regards contractors being in particular intricate, and in some points obscure, that it was thought better not to enter minutely into them, but to be content with commending them to the attention of His Majesty's Government, when they and their legal advisers proceed to draft a Bill for dealing with the matter.

It was conceived that peers who have not been elected to the Second Chamber ought to be allowed to stand for the House of Commons, as Peers of Ireland have been since the Union in 1800. The case of Lord Palmerston is a familiar one.

There seemed to be no reason why the ancient rule which requires a Member of the House of Commons desiring to resign his seat to do so by the fiction of accepting such an obsolete office as that of the stewardship of the Chiltern Hundreds, or the stewardship of the Manor of Northstead, should be applied to the new Second Chamber; and it is accordingly suggested that its Members may retire by the simple method of addressing a formal letter of resignation to the President or Speaker of that Chamber.

41. Three other points deserve careful consideration. They are these:

- (a) Whether Ministers of the Crown ought to be allowed to speak in both Houses of Parliament, of course with no right of voting except in the House to which they belong.

¹ If clergymen of the Protestant Episcopal Church in Ireland are now disqualified (a point which seems to be in doubt) their disqualification also ought to be removed.

- (b) Whether salaries similar to those now paid to the Members of the House of Commons should be paid to Members of the Second Chamber also.
- (c) What provisions should be made for the period of transition from the existing House of Lords to the new Second Chamber so that the regular working of our constitutional machinery should go on through this period.

These points, since they raise issues which the Conference did not seem called upon, or perhaps even empowered by the Terms of Reference, to deal with, are submitted to the judgment of His Majesty's Government, and it was left to them to deal with various minor non-controversial matters relating to the requirements necessary for carrying out in detail the Scheme whose main lines have been laid down in Part II of this Report. Among these would be the dates to be fixed for the elections by the several groups of the Members of the House of Commons and the details to be settled respecting the filling up of vacancies, both casual and those which will arise at the expiring of the three quadrennial periods. In order not to encumber the scheme by these minor matters they are submitted to the judgment of the Government and of Parliament. Some of them might, perhaps, be usefully dealt with by an Order in Council.

42. Upon one interesting question which was discussed—namely that of the possibility of turning the Second Chamber to good account for the purpose of including in it persons who might be qualified both to express the views of the Self-Governing Dominions and other parts of the British Overseas possessions, and to join with full knowledge in discussing questions affecting them, it was held by the Conference, after the matter had been debated with a full recognition of its importance, that they were precluded by their Terms of Reference from making recommendations which, if adopted, might affect the relations of the Parliament of this country with outlying parts of the Empire.¹ But the hope was expressed in the course of the discussion that this matter would receive the careful consideration of His Majesty's Government.

¹ A similar remark applies to a suggestion made by one of our members that, were a federation of the United Kingdom to be effected, it might by a transfer of legislative powers to subordinate parliaments so reduce the likelihood of disagreements between the two Houses as to make any large change in the composition of the Second Chamber unnecessary. This also was deemed to lie outside of the Terms of Reference.

The Conference then passed on to another of the three topics set out in the Terms of Reference, *viz.*, the legislative functions which the Second Chamber ought to exercise.

LEGISLATIVE FUNCTIONS OF THE SECOND CHAMBER

43. Only in one respect does this subject present any serious difficulty. It has always been understood in this country—and this is the practice in nearly every country where a Second Chamber exists—that the Second Chamber should be entitled to full power in the sphere of such legislation as is not of a financial character. It may revise and amend, and in some cases refuse to proceed with, a Bill brought to it from the other House. It may initiate ordinary Bills both Public and Private. It may discuss all questions of general domestic and imperial policy. In financial matters alone is its range of action limited by the long established superior rights of the popular House. Accordingly, it was with questions of finance and with these only that the Conference found it had to deal.

44. The Conference was agreed in declining to attempt to recast as a whole the old rules which have determined the privileges of the House of Commons with regard to Finance. These are now a sort of labyrinth of historical, constitutional, and legal controversies. Thus it was resolved to deal with one branch only of the subject—the distinction to be drawn between Bills which are purely financial in effect as well as in form and those which, though containing some financial provisions, are also calculated to attain non-financial objects, the method of discriminating between these two classes of Bills, and the consequences which ought to follow from such discrimination.

45. It is recognized on all hands that Bills of a purely financial nature belong to the House of Commons alone and ought not to be rejected or amended by the Second Chamber.

But what is a purely financial Bill?

A Bill brought into the House of Commons whether to raise revenue or to appropriate revenue for particular public purposes may, while purporting to be concerned only with the raising and spending of money, have effects—industrial, commercial, social, or political effects—more important and far reaching than would be its direct financial effects. Many large changes—indeed some revolutionary changes—might be carried through by measures purporting to be financial. The Conference thought that, if the new Second Chamber, elected as proposed, is to be of real service, its views ought to be heard regarding

such changes. It would appear to be required, in the interests of the people, and that not merely as taxpayers, but as citizens also, that such measures should not be hastily hurried into law without due consideration : and a Second Chamber constituted as proposed would seem fitted to furnish a safeguard for this purpose. The jealousies and antagonisms which have in time past attached to the action of a non-representative House confined to the members of one, and that, for the most part, a wealthy class, need not be expected to apply to the action, strictly limited as the Conference think it should be, of a Second Chamber so much changed in its composition and so popular in its character as it will be under the Scheme hereinbefore described. If this be admitted, the question is raised : How are purely financial Bills to be discriminated from others which, while to some extent and for some purposes financial, are also much more important in their non-financial effects than in those that relate merely and directly to the raising and spending of money ?

46. The obvious method might appear to be to find a clear and precise definition which could be inserted in a statute for distinguishing these two kinds of Bills. The Conference spent many hours in trying to find such a definition, but without success. Some proved to be too wide, others too narrow. The complexity of the problem, and the variety of the cases which had to be provided for, were baffling ; and very high authorities who were consulted declared that this had been their experience also. But an examination of the cases of doubt which had arisen in this country and elsewhere showed that most, perhaps nearly all of them, could have been disposed of after a not very protracted discussion round a table by a dozen practical, fair-minded men ; and the Conference was thus led to believe that the best method of treating these doubtful and disputable Bills would be to refer them to a small, carefully selected Joint Standing Committee of both Houses of Parliament, making its decision final. Such an arrangement for deciding these delicate questions seemed preferable to that contained in the Parliament Act, which does not cover all the cases likely to arise, and which places on the Speaker responsibilities with which it is not desirable to load an office whose perfect impartiality everyone desires to preserve. The Conference accordingly recommends that such a Finance Committee, which ought not to exceed in number seven members from each House, be set up at the beginning of each Parliament, and that either House should be entitled to refer to it any financial Bill containing provisions which raise serious issues that may be thought to be not solely

of a financial nature. It would be the duty of such a Committee to consider not only the professed objects, but also the underlying purpose and the probable effects of such a Bill, in order to determine its character and to report which (if any) of its clauses are, as being strictly financial, fit to be dealt with by the House of Commons alone, and which (if any) may properly be subjected to examination and amendment by the Second Chamber in respect of the economic or social results to be expected from them, these being matters of general national policy. Should the Committee report in the latter sense, such provisions as were declared to be non-financial would be open to rejection and amendment by the Second Chamber, subject always to the ancient rule that no amendments should be made by the Second Chamber which could increase any charge upon the people. If amendments were made in bills declared to be non-financial, and these were not accepted by the House of Commons, the differences between the two Houses would fall to be adjusted in the manner (to which I now pass) provided for the case of an ordinary non-financial Bill.

ADJUSTMENT OF DIFFERENCES BETWEEN THE TWO HOUSES

47. The Conference then reached the last of the three subjects mentioned in our Terms of Reference, *viz.*, the Adjustment of differences between the two Houses. This has long been regarded as one of the most difficult of all the questions affecting the position and powers of a Second Chamber. It divides itself into two branches :

- (a) The methods of conciliation and compromise by which differences may be settled without any ultimate trial of strength.
- (b) Some plan for final settlement when no compromise has been found attainable.

48. (a) Conferences between the two Houses to settle their differences have been an old part of Parliamentary machinery. They have, however, been of comparatively slight value, and little used in recent years, because the rules which governed them were stiff and cumbrous. It is therefore proposed to apply a simpler and more elastic method, which is really new, though it may fitly be called by the old name of Free Conference. The suggestion is that a small number of the most experienced, most judicious and most trusted members of each House be chosen at the beginning of each Parliament, due representation being given to all the parties that may exist in each House, to

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form a Standing Conference Committee, and that another smaller number be added by each House of persons who, while possessing the same merits as belong to the permanent element, should also possess in addition a special knowledge of the particular matter to be dealt with in the particular controversy. The permanent number might, it was thought, be twenty from each House, in order that the body should not be too large for easy and informal discussion and should not be liable to be moved by that warmth of feeling which is apt to increase with the numbers of any assembly. The number of additional members to be added *pro re nata* in respect of special knowledge would be determined by the magnitude of the issue involved, but ought not (it was deemed) to exceed ten from each House, so that the total number of the body should not in any case exceed sixty.

49. When the Free Conference Committee thus constituted had been set up, any amendments made by either House to a Bill passed by the other, would, if they were not accepted by that other House, stand referred, at the request of either House, to the Free Conference. The Free Conference would then address itself to the solution of the controversy by friendly methods, exploring the various points involved and seeking to find a way out of the difficulty either by compromise or by discovering some new plan which might prove more acceptable to both Houses than that contained in the Bill passed by one House, or in the amendments passed by the other. If and when agreement is reached by the Free Conference its terms would be reported to both Houses. Each House would then consider them and accept them or reject them. If they were accepted by both Houses *en bloc* the controversy would be at an end, and the Bill would be in a position to receive the assent of the Crown. If, however, the Bill (as reported by the Free Conference) was accepted by one House but rejected by the other, some further method of effecting an adjustment would be required. To this point I return below.

50. It may be asked whether the Free Conference should sit in private or in public. The view taken was that its proceedings should be conducted in secret, for only thus can perfect freedom of discussion be secured. Its members ought to be at liberty to make suggestions for compromise without prejudice to their own subsequent action in further sittings or when the matter comes before each House as a whole. A record of the proceedings would be kept, and would state, unless the Free Conference should otherwise determine, the numbers voting in each division, but would not give the names of Members voting.

Whether this record should be published along with the Report might be left to the Free Conference to determine.

51. Another question is, Should it be open to either House to require the reference to the Joint Standing Committee of a Bill rejected *in toto* by the other House?

We hope and believe that when the system of Free Conferences has been established, rejections of a Bill will rarely occur. It would be generally felt more desirable that objections taken to a Bill should be set forth in amendments made to it. But if a Bill were rejected, and either House wished the issues raised to be referred to a Free Conference, it was thought that this method of endeavouring to secure agreement need not be ruled out.

52. (b) The question remains to be considered whether, in the event of a compromise having been found unattainable by means of a Free Conference, some other, and, if so, what plan should be resorted to for the purpose of obtaining a final settlement of differences between the two Houses.

Suppose, for instance, that the proposals for adjustment reported by the Free Conference have been accepted by one House and rejected by the other, what further steps would be required to solve the deadlock?

Three such methods were put forward for consideration and were very carefully examined.

53. The first was that the House which accepted the Bill as reported by the Free Conference should have the right of referring it to a Joint Sitting of both Houses. The Bill would then be discussed by the members of both Houses united together (as they were before the Lords and Commons began to sit apart) in the Great Council of the Nation in Parliament assembled, and, if not there settled by agreement, its fate would be decided by a vote of the whole united body. This plan had obtained influential support some years ago when the subject was considered by a Committee of the House of Lords. But though some advantages it presented were recognized, obvious objections presented themselves in respect of the great size of the united body, the various difficulties attending its procedure, and the possibility that its presence in the background might make agreement in a Free Conference less probable. Thus it finally failed to command general assent.

54. A second plan was that of referring the matters in controversy between the Houses to the country by means of a Referendum or popular vote of all the registered electors. This proposal received considerable support, and some who favoured it remain of opinion that it is the best method of solving dead-

locks. They desire that when the two Houses have failed to agree to a Bill as reported from the Free Conference it should be open to the House of Commons to submit the Bill as approved by the Free Conference to a vote of the people. The vote might take place at a date to be fixed by Order in Council not less than sixty days after the House of Commons had passed the Resolution asking for a Referendum, or, if it were judged convenient by the Government, the Order in Council might fix the next General Election as the time for the vote. If the result of the vote were adverse to the Bill the Bill would be dead. If the result of the vote were favourable, the House of Commons would have authority to submit the Bill to Royal Assent without the concurrence of the Second Chamber. By this method, it was thought, the essential principle of self-government, that the people must in the last resort themselves decide what legislation they desire, would be applied without invading the representative character of the House of Commons or diminishing its proper authority as a representative assembly. It was further urged, in support of this plan, that the knowledge that the possibility of a reference to the people might ultimately be resorted to would greatly stimulate and strengthen conciliatory influences within the Free Conference and commonly lead to the adjustment of differences by mutual concession between the contending parties.

55. The majority of the Conference, however, did not approve this plan on the ground (among others) that the use of the Referendum once introduced could not be confined to the cases for which it was in this instance proposed, that it might tend to lower the authority and dignity of Parliament, and that it was unsuited to the conditions of a large country, and especially of the United Kingdom, for different parts of which different legislation is sometimes required.

56. When it appeared that the judgment of the Conference as a whole did not favour either of the two plans above stated, it became necessary to search for some other method of adjustment. This was at last discovered by returning to and carrying further that mode of proceeding by Free Conference which has been already outlined.

It has been already observed that if a Bill reported from a Free Conference had been accepted by one House but rejected by the other some further step would be required. This step would be to send the Bill back to the Free Conference, which would take up the matter again in the Session next following that in which the Bill originated. If the Free Conference should then, after further consideration, again report the Bill

to the Houses in the same form in which it had been previously reported, the Houses would again consider the Bill.

If they both agreed to it, it would pass ; if they both disagreed to it, or if the House of Commons alone disagreed, it would lapse. If, however, the House of Commons alone agreed to the Bill, and it had been reported by the Free Conference by a majority of not less than three of the members present and voting, it would be submitted for the Royal Assent.

Should the Free Conference, however, fail to agree to report the Bill again in the same form, or if the majority by which it agreed to report it should be less than three, the Bill would lapse, unless of course it was accepted by both Houses as reported.

57. It will be clear that the effect of this procedure would be on the one hand to secure that full opportunity should be given for reconciling different views by amendments and methods of compromise generally, and on the other hand to provide that nothing less than a majority of three in the Free Conference (which will itself consist of selected members of both Houses)—a majority which would be substantial having regard to the numbers of the Conference—would suffice to determine the points in issue. This would, it is submitted, safeguard the rights of both Houses, for the Second Chamber would not be overruled, unless a considerable proportion of those who represented it in the Free Conference had voted in favour of the Bill, while the ultimate control of the more popular House would be respected.

58. It is believed that by this method of Free Conferences, applied in a calmer atmosphere than could be expected in either House as a whole, the arguments on which each party relied would be better appreciated. Many controversies might thus be amicably settled, and even where they were not wholly settled, the matters in dispute would probably be reduced in number, so that when the plan proposed for decision in the last resort had to be applied, the issues to be submitted to such final arbitrament would have become fewer and more clearly defined.

59. In order to prevent any possibility of confusion between the three different Joint Committees of both Houses recommended for different purposes by the Conference, *i.e.* : 1. The Joint Committee for the election of a portion of the Second Chamber, 2. The Joint Committee for deciding questions with regard to Financial Bills, 3. The Joint Committee (or Free Conference) for conferring about differences of opinion with regard to questions of general legislation, the following Table,

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in which their functions, method of composition, etc., are detailed, is given.

It may be added in support of this extended application of the machinery of Joint Committees that the Conference hoped that by such means there might be attained a better understanding and closer co-operation between the two Houses of Parliament, than it has in the past been found possible to secure.

TABLE OF JOINT STANDING COMMITTEES RECOMMENDED TO BE SET UP, SHOWING THEIR COMPOSITIONS, FUNCTIONS, ETC.

TITLE.	FUNCTIONS.	NO.	METHOD OF COMPOSITION.	DURATION.
Electing Joint Committee or Commission	To elect one-quarter of Second Chamber	10	5 to be chosen by Speaker, 5 to be chosen by Committee of Selection of House of Lords and afterwards of Second Chamber	One Parliament
Financial Joint Committee	To decide whether Bills, or provisions, referred to them are Financial	14 or 15	7 appointed by Committee of Selection of each House, with power to co-opt Chairman from outside	One Parliament
Free Conference	To adjust differences between the two Houses with regard to Bills (or provisions in Bills) other than Financial	60	A. 20 appointed by Committee of Selection of each House B. 10 additional members, similarly appointed, <i>pro re nata</i> , by each House	A. One Parliament B. For proceedings in Conference on a particular Bill

60. We are aware that not a few criticisms may be made upon the Scheme here presented. Some of these will, it is to be hoped, be dropped, or reduced in force, when the explanations given have been duly considered and when each part of the scheme is regarded in its relation to the whole, and apart from any bias which may have arisen from former controversies. If other objections still remain, the best answer to them will be found in the fact that among the Second Chambers which exist in other countries there is not one whose composition cannot be attacked on grounds at least as grave as any that can be brought against this scheme, yet there is none among these Chambers which does not, in the opinion of its own people, contribute to the good government and tranquillity of the country where it exists. Perfection is not to be expected in any Chamber or in any frame

of government. The true test is whether it is so constructed as to offer a reasonable prospect of so discharging the functions for which it is designed as to contribute to the excellence of legislation and welfare of the whole body politic.

61. Those who criticize will, we trust, appreciate the nature, and weigh the difficulties, of the task imposed upon us. We had to reconcile the sentiment of attachment to a venerable institution with the needs of new social conditions and the demands of new phases of thought. There were two principles on which a Second Chamber might be constructed. One was that of filling a House with the largest available number of capable and experienced men whose presence would win for it that kind of authority which comes from personal eminence. The other principle was that of creating a Chamber which should be most quickly responsive and most fully responsible to public opinion, drawing its strength from the fact that it had been popularly elected. It was impossible to give full scope and application to either of these principles and to secure in ample measure the benefit of either source of strength without losing some of the merits to be expected from the other. We had, therefore, to find means whereby to combine as many as possible of the advantages with as few as possible of the defects of either course, and we had to remember that a plan which philosophers might approve would not necessarily find like favour with the bodies by whose will it would have to pass into law. So, too, when the powers of the Second Chamber had to be defined, similar perplexities arose. It was generally agreed that a Second Chamber would be of little use unless it were strong enough to differ from the House of Commons when a proper occasion arose—a proper occasion being one in which there was reason to believe that some decision of the Commons did not express the full and deliberate will of the people. But it was also agreed that the Second Chamber ought not to be so strongly entrenched as to dispose it to engage in frequent contests with the House of Commons, so as to embarrass the Executive and clog the wheels of legislation. It thus became necessary to steer a middle course between these extremes, assigning to the Second Chamber such powers only as the interests of the nation seem to require and finding expedients by which differences between the Houses might be adjusted with the minimum of friction and delay, avoiding conflicts by methods of conciliation.

62. On a subject which presents so many aspects as that we have had to deal with there must needs be differences of opinion. All political parties were represented in the Conference. But

such divergences of view as from time to time arose did not often spring from or correspond to divergences of political opinion. They were due rather to the greater or less weight which our members respectively attached to principles they all admitted, and also to the diverse conjectures that were formed about the probable working out in practice of the various plans presented. In such matters a diversity of views is inevitable among men of independent minds. It has not prevented the great majority of the Conference from recommending the scheme here drawn out, though some members dissent, as mentioned in paragraph 22, from the plan of election by Members of the House of Commons acting in geographical groups, and other members have respectively preferred various other methods of election which have not received the support of the majority of the Conference, while one or two members thought that the powers of the Second Chamber should be more restricted than the majority deemed requisite.

63. I may perhaps be permitted to add a word as Chairman of the Conference. One of the things that most struck me in presiding over the long and animated discussions of the Conference was that every member was not only scrupulously careful to avoid recrimination over past controversies, but also recognized, above and beyond all differences of opinion, the fairness and goodwill of his colleagues, and gave to each and all of them the credit of honestly and sincerely seeking what was best for the country without thought of the special interest of his own class or party. Whatever judgment may be passed on our labours we hope that the Conference will be felt to have addressed itself with a single and an earnest mind to the duty that was assigned to it—the duty of trying to reconstruct upon lines fitted to the conditions of our time an important part of that ancient and famous Constitution which many nations have taken as a model and which has for more than seven centuries safeguarded the liberties and advanced the greatness of the British people.

Commending the conclusions embodied in this Report to the consideration of yourself and your colleagues,

I have the honour to be, my dear Prime Minister,

Very faithfully yours,

BRYCE.

April, 1918.

APPENDIX B

BILLS FROM THE COMMONS WHICH FAILED TO PASS THE SENATE, 1867-1924.

1867-8

Bills relating to the Criminal Law :

- Offences against the Coin ;
- Procedūre and Other Matters ;
- Cruelty to Animals ;
- Indictable Offences by Forgery ;
- Justices of the Peace out of Sessions in relation to Indictable Offences ;
- Summary Administration of Justice ;
- Juvenile Offenders ;
- Justices of Peace out of Sessions in relation to Summary Convictions ;
- Offences against the Person ;
- Perjury ;
- Malicious Injuries to Property ;
- Larceny and Similar Offences.

Patents and Inventions.

1869

Inspection of Raw Hides and Leather Acts Amendment.

1871

Kingston Board of Trade.
Toronto Corn Exchange.
Windsor Board of Trade.
Weights and Measures.

1872

Insolvency Laws Repeal.
North-West Trading Company.

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1873.

Bills of Exchange and Promissory Notes Law Amendment.

1874

Representation House of Commons (Tuckersmith Bill).
Canada Investment and Guarantee Co.

1875

Esquimalt-Nanaimo Railway.
Salaries County Court Judges Nova Scotia.
Better Protection Persons and Property conveyed by Railway.

1876

Investment Co. of Canada.
Transportation of Cattle by Railways.
United Empire Trust Co.
Canada Landed Credit Co. Enlarged Powers.

1877

Collection of Revenue and Auditing Public Accounts.
Admission of Fish and Oil Inspected by Newfoundland.

1878

Law of Evidence Misdemeanors Amendment.
Office of Receiver-General and Attorney-General.
Pacific Railway (Pembina Branch).
Supreme and Exchequer Court Act Amendment.

1879

Bank Holidays.
Additional Judges Supreme Court British Columbia.
Marine Electric Telegraphs Act Repeal.
Insolvency Laws Repeal.

1880

To Legalize Marriage with Deceased Wife's Sister.
To Provide that Persons charged with Common Assault shall
be Competent Witnesses.

1880-1

Don River Improvement Co.

1883

Offences against the Person.
Cruelty to Animals.
Seduction and Like Offences.
Fisheries Act Further Amendment.

1884

Seduction and Like Offences.

1885

Law of Evidence, Criminal Cases Further Amendment.
Canada Temperance Act Amendment.
Maritime Court of Ontario.

1886

Chinese Immigration Acts Consolidation and Amendment.
Railway Act 1879 Amendment.
Law of Evidence Further Amendment.

1888

Ottawa, Morrisburg and New York Railway and Bridge Co.

1889

To Permit Foreign Vessels to Aid Vessels Wrecked in Canadian Waters.
Harvey to Salisbury Railway.
Ottawa, Morrisburg and New York Railway and Bridge Co.

1890

Combinations in Restraint of Trade.
Elbow River Water Power Co.

1891

Inverness and Victoria Railway Co.
Whirlpool Bridge Co.

1892

School Savings Bank Act Amendment.

1894

Lord's Day Observance.

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1895

Canadian Order Foresters.

1896 (2nd session)

Hull Electric Railway.

1897

Cataract Power Co. Ltd.

Intercolonial Railway Extension to Montreal (Drummond County Railway).

Kingston and Pembroke Railway Co.

Pilots Serving between Quebec and Montreal.

Railway Act Amend. (Bicycle Bill).

Restigouche and Victoria Railway Co.

Winnipeg, Duluth, Northern Railway Co.

1898

To Confirm Agreement for Construction of Yukon Railway.

Manitoba School Fund.

North American Telegraph Co.

Railway Safety Appliance Act.

Sons of England Benefit Society.

Trade Mark and Design Act Amendment (Union Labels).

1899

Criminal Code Amendment.

Representation in House of Commons.

British American Pulp, Paper and Railway Co.

Trade Mark and Design Act Amendment (Union Labels).

1900

Judges of Provincial Courts Act Amendment.

Judges of Provincial Courts Act Further Amendment.

Land Titles Act, 1894, Amendment.

Post Office Act Amendment.

Representation House of Commons.

Canada National Railway and Transport Company.

Gaspé Short Line Railway.

Dominion Atlantic Railway Co.

1901

Animal Contagious Diseases Act Amendment.

Montreal and Southern Counties Railway Co.

South Shore Railway Co.

Credit Foncier de Bas Canada.

1902

Petition of Right Act Amendment.
Gaspé and Western Railway.
Bishop of Orthodox Russo-Greek Church.

1903

Gaspé and Western Railway.
Maritime Railway and Transportation Co.

1904

Aliens.
Exchequer Court Act Amend.
Hamilton, Grimsby and Beamsville Electric Ry. Co.
New Brunswick Southern Ry. Co.

1905

Labour Union Labels.

1906

Railway Act Amendment (Level Crossings).

1906-7

Railway Act Amendment (Level Crossings).
Western Rivers Improvement Co.

1907-8

Co-operation.
Saskatoon, Saskatchewan, Peace River and Dawson Railway.

1909

Exchequer Court Act Amendment.
Insurance.
Railway Act Amendment (Level Crossings).

1910-11

Interest Act Amendment.
Hours of Labour on Public Works.
Vancouver and Lulu Island Railway Co.
Railway Act Amendment (Fortnightly Pay for Employees).
Ontario and Minnesota Power Co.

1911-12

Improvement of Highways.
To Provide for Tariff Commission.
Subsidy in Aid of Temiskaming and Northern Ontario Railway.
Inspection and Sale Act Amendment.

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1912-13

Improvement of Highways.
Government Railways Act Amendment.
To Authorize Measure for Increasing Effective Naval Forces of
the Empire.
Canadian Northern Branch Lines.
Prudential Life of Canada.
Richelieu and Ontario Navigation Co.

1914

Farmers Bank Depositors' Relief.
Post Office Act Amendment.
Labrador, Quebec and Southern Railway Co.
Resolution Increasing Representation of Western Provinces in
the Senate.

1915

Supreme Court Act Amendment.
Inland Revenue Act Amendment.

1916

Railway Act Amendment.

1917

Railway Acts Consolidation and Amendment.
Government Railways Act.

1918

Inspection and Sale Act Amendment.

1919

Criminal Code Amendment (Sexual Offences).
Biological Board Act Amendment.
To Confirm Order-in-Council for National Prohibition.
Northwest Route Limited.
Athabasca, Grand Prairie and Fort Vermilion Railway.
Electric and Power Companies.
Protection Navigable Waters Act Amendment.

1921

Research Council Act Amendment.
La Compagnie de Telephone Quebec Union Electric.

1922

Criminal Code Amendment.
Lake of Woods Regulation Act Repeal.
Scrip Frauds Act Repeal.
Quebec Railway, Light and Power Co.
Buffalo and Fort Erie Bridge Co.

1923

Admiralty Act Amendment.
Canada Temperance Act Amendment.
Cold Storage.
Fisheries Act, 1914, Amendment.
Industrial Disputes Act Amendment.
Lake of Woods Regulation Act Repeal.
Post Office Act Amendment.
Canadian National Railway Branch Lines.

1924

Canadian National Railway Branch Lines :
 Kelvington ;
 Lloydminster ;
 Nipawin ;
 Radville-Bengough-Ritchie ;
 Rousseau-Laurent ;
 Sunnybrae-Guysborough ;
 Turtleford-Hafford.
Canada-Finland Trade Agreement.
Canteen Funds Disposal.
Industrial Disputes Act Amendment.
Public Service Retirement Act.
Scrip Frauds Act Repeal.

APPENDIX C

STATISTICS OF LEGISLATION IN THE SENATE

(i) Legislation before the Senate by Decades.

	TOTAL.	GOVT. BILLS INITIATED IN SENATE.	PRIVATE MEM- BERS' BILLS INITIATED IN SENATE.	PRIVATE BILLS INITIATED IN SENATE.	DIVORCE.	GOVT. BILLS FROM COMMONS.	PRIVATE MEM- BERS' BILLS FROM COMMONS.	PRIVATE BILLS FROM COMMONS.
1867-1877	1,000	99	18	51	11	383	22	476
1878-1887	1,001	97	29	37	17	328	20	464
1888-1897	1,142	95	34	31	49	305	18	610
1898-1907	1,591	54	33	140	62	413	15	874
1908-1917	1,653	31	49	321	216	431	8	597
1918-1924	1,459	34	35	71	629	469	4	177
Totals	7,796	410	198	651	984	2,329	96	3,128

(ii) Treatment of Bills brought up from the House of Commons.

	PUBLIC.†					PRIVATE.				
	TOTAL.	AMENDED.	PER CENT. AMENDED.	FAILED.	PER CENT. FAILED.	TOTAL.	AMENDED.	PER CENT. AMENDED.	FAILED.	PER CENT. FAILED.
1867-1873	226	57	25.2	17	7.9	242	95	39.3	9	1.7
*1874-1878	205	51	25	11	5.4	192	68	35.4	4	2.1
1879-1896	619	129	20.8	15	2.4	979	329	32.6	9	.9
*1896-1903	288	52	18	14	5.2	588	118	20.2	23	3.9
1904-1911	355	61	17.2	12	3.4	622	168	27	8	1.3
*1911-1916	222	40	18	14	6.6	308	61	20	4	1.3
1917-1921	303	57	18.8	9	3	124	19	15.3	3	2.4
*1922-1924	207	54	26	22	10.6	73	8	10.9	2	2.7

These tables have been compiled from the *Senate Journals* and are meant to be approximate only. It is sometimes difficult

† Includes both Government and Private Members' Bills.

* Majority of Senate of opposite party to majority of Commons.

to classify bills as public, private, government, or private members' without more investigation than the subject would warrant, hence mathematical accuracy is not claimed for these figures, though it is believed that they are fairly correct.

For other estimates which do not agree with mine but which show the same tendencies see Ross, *The Senate of Canada*, 78 ; Senator Power, in *Canada, an Encyclopedia* (ed. Hopkins), 443 ; Sir Alexander Campbell, *S.D.* 1885, 65.

APPENDIX D

CATEGORIES OF CITIZENS ELIGIBLE FOR MEMBERSHIP IN THE BELGIAN AND ITALIAN SENATES.¹

BELGIAN SENATE

ART. 56A. To be eligible to be elected Senator by the application of clause 1 of Article 53, it is necessary, moreover, to belong to one of the following categories :

- (1) Ministers, former ministers, and ministers of state.
- (2) Members and former members of the House of Representatives and of the Senate.
- (3) Those possessing a diploma for completion of studies granted by one of the institutions of higher learning, the list of which shall be determined by law.
- (4) Former superior officers of the army and navy.
- (5) Titular members and former members of the commerce courts who have been invested with at least two commissions.
- (6) Those who have, for at least ten years, exercised the functions of a minister of one of the religions whose members enjoy emoluments from the state.
- (7) Titular members and former members of one of the royal academies, and professors and former professors of one of the institutions of higher learning, the list of which shall be determined by law.
- (8) Former provincial governors ; members and former members of permanent deputations ; former commissioners of an arrondissement.
- (9) Members and former members of provincial councils who have been invested with at least two commissions.
- (10) Burgomasters and former burgomasters, aldermen and former aldermen of communes, of capitals of arrondissements, and of places having more than 4,000 inhabitants.

¹Quoted from McBain and Rogers, *The New Constitutions of Europe*.

(11) Former Governors-General and Vice-Governors-General of the Belgian Congo, members and former members of the Colonial Council.

(12) Former directors-general, directors, and inspectors-general of the different departments.

(13) Proprietors and usufructuaries of real estate situated in Belgium the assessed income of which amounts to at least 12,000 francs; taxpayers paying annually into the treasury of the state at least 3,000 francs in direct taxes.

(14) Those who, in the capacity of delegated administrator, director, or with an analogous title, have been placed for five years at the head of the daily management of a Belgian commercial joint-stock society, whose capital is paid up to the amount of at least a million francs.

(15) Chiefs of industrial enterprises employing, on a permanent basis, at least 100 workmen and of agricultural enterprises including at least 100 acres.

(16) Those who, in the capacity of managing director or with an analogous title, have been placed for three years at the head of the daily management of a Belgian co-operative society numbering for the last five years at least 500 members.

(17) Those who, in the capacity of effective members, have exercised for five years the functions of president or secretary of a mutual society or a mutual federation, numbering for the last five years at least 1,000 members.

(18) Those who, in the capacity of effective members, have exercised for five years the functions of president or secretary of a professional, industrial, or agricultural association, including for the last five years at least 500 members.

(19) Those who for five years have exercised the functions of president of a chamber of commerce or of industry, numbering for the last five years at least 300 members.

(20) Members of industrial and labour councils, provincial agricultural commissions, and councils of experts who have been invested with at least two commissions.

(21) Elected members of one of the consultative councils established in connection with ministerial departments.

New categories of eligibles may be created by a law, which must receive at least a two-thirds majority vote.

THE ITALIAN SENATE

ART. 33. The Senate shall be composed of members, appointed for life by the King without limit of numbers, who

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have attained the age of forty years and who have been chosen from the following categories of citizens :

- (1) Archbishops and bishops of the state.
- (2) The President of the Chamber of Deputies.
- (3) Deputies after having served in three legislatures, or after six years of service.
- (4) Ministers of state.
- (5) Ministers secretaries of state.
- (6) Ambassadors.
- (7) Envoys extraordinary, after three years of such service.
- (8) The first presidents and presidents of the Courts of Cassation and of the Court of Accounts.
- (9) The first presidents of the courts of appeal.
- (10) The attorney general of the Courts of Cassation, and the prosecutor general, after five years of service.
- (11) The presidents of the chambers of the courts of appeal, after three years of service.
- (12) The councillors of the Courts of Cassation and of the Court of Accounts, after five years of service.
- (13) The attorneys general and fiscals general of the courts of appeal, after five years of service.
- (14) General officers of the land and naval forces.
Major generals and rear admirals, however, should have five years of active service in that grade.
- (15) The councillors of state, after five years of service.
- (16) The members of the councils of division, after three elections to their presidency.
- (17) The intendants general, after seven years of service.
- (18) Members of the Royal Academy of Sciences, after seven years of membership.
- (19) Regular members of the Superior Council of Public Instruction, after seven years of service.
- (20) Those who by their services or eminent merit have done honour to their country.
- (21) Persons who, for at least three years, have paid direct property or business taxes to the amount of 3,000 lire.

ART. 34. The princes of the royal family are, by that very fact, members of the Senate. They shall take rank immediately after the president. They shall enter the Senate at the age of 21 and have a vote at 25.

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